



# THE ARMY LAWYER

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### Editor

Captain Daniel P. Shaver

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DEPARTMENT OF THE ARMY  
OFFICE OF THE JUDGE ADVOCATE GENERAL  
WASHINGTON, DC 20310-2700



REPLY TO  
ATTENTION OF

DAJA-CL

6 AUG 1990

MEMORANDUM FOR STAFF AND COMMAND JUDGE ADVOCATES

SUBJECT: Selection of Court Members -- Policy Memorandum 90-2

1. A staff or command judge advocate is not only the chief legal advisor to the command, but also an officer of the legal system with a special responsibility for the quality and fairness of military justice. The judicial and quasi-judicial functions performed by convening authorities demand that your legal advice be both fair and neutral. One of these functions is selection of court members, and your role is not that of an advocate or to orchestrate the results of courts-martial. Manipulation of the selection process or the criteria of Article 25, Uniform Code of Military Justice, to obtain specific findings or to achieve heavier sentences is unlawful. See United States v. McClain, 22 M.J. 124 (C.M.A. 1986).

2. Article 25 provides the sole criteria by which the convening authority selects the "best qualified" persons to fairly and judiciously determine facts and punishment in accordance with the law and the instructions of the military judge. A staff or command judge advocate must strictly ensure that the selection process comports with the Code. Trial counsel should be excluded from the selection process; motivations which are inconsistent with the purposes of Article 25 must be eliminated; and under no circumstances should the selection process become a vehicle for unlawful command influence.

3. Your responsibilities to the Army as your client and to the military justice system require that you be keenly sensitive to abuses in the selection process. You must recognize improper motivations, and more importantly you must intervene to prevent any effort to subvert the selection process. Anything less will undermine the fairness of the military justice system and the esteem accorded our courts-martial process.

*William K. Suter*

WILLIAM K. SUTER  
Major General, USA  
Acting The Judge Advocate General

# CID and the Judge Advocate in the Field—A Primer<sup>1</sup>

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## Introduction

The successful investigation and prosecution of serious criminal cases involving soldiers (and, in some instances, defense contractors) depends a great deal upon early and continuous communication between judge advocates and CID special agents. The purpose of this article is to give a brief description of the organization and function of the United States Army Criminal Investigation Command (USACIDC)—better known as CID. The article includes discussion of CID's expanded role in procurement fraud and the effect of *United States v. Solorio*<sup>2</sup> on CID investigations.

## USACIDC Organization

The U.S. Army Criminal Investigation Command was established as a separate major Army command on 17 September 1971.<sup>3</sup> It provides centralized criminal investigative support to Headquarters, Department of the Army, and to Army commanders worldwide. To provide this support, USACIDC is organized into a Command Headquarters (located in the Nassif Building at Falls Church, Virginia), five regional headquarters, and a Criminal Investigation Laboratory Command. Each region is assigned a specific geographic area of responsibility. More than 100 field elements, which consist of districts, field offices, resident agencies, and branch offices, are also assigned geographic areas of responsibility within their respective regions. The Laboratory Command supervises three laboratories: one at Frankfurt, Germany; one at Camp Zama, Japan; and one at Fort Gillem, Georgia.

Because only a few judge advocates are assigned to USACIDC, CID agents in the field depend primarily

upon their supporting judge advocates for criminal investigative legal advice.<sup>4</sup> Only three judge advocates and two civilian attorney advisors are assigned to USACIDC Headquarters. Each region headquarters also has a judge advocate assigned to provide legal support. In addition to the functions associated with helping the command perform its mission within legal constraints, the region judge advocate (RJA) serves as a liaison between local judge advocate personnel and CID agents on current matters of interest, such as electronic surveillance operations,<sup>5</sup> Inspector General subpoenas,<sup>6</sup> off-post drug operations,<sup>7</sup> and procurement fraud investigations.<sup>8</sup> In short, the RJA serves as the region commander's in-house legal counsel.

## Reporting and Investigating Offenses

Commanders are required to ensure that certain categories of criminal incidents or allegations in the Army are reported to the military police. These include those incidents affecting or involving persons subject to the Uniform Code of Military Justice (UCMJ),<sup>9</sup> civilian employees of the Department of Defense (in connection with their assigned duties), or government property under Army jurisdiction. Additionally, incidents occurring in areas under Army control must also be reported.<sup>10</sup> The military police, in turn, refer the criminal information to the appropriate investigative agency. USACIDC bears the responsibility within the Army for the investigation of Army-related serious offenses (offenses punishable by death or confinement for more than one year).<sup>11</sup> If the commander knows that the alleged offense is within CID's investigative purview, the commander may report the offense directly to CID.

CID investigative efforts are directed first toward establishing whether a criminal offense has occurred and

<sup>1</sup> This article is a revision and an update of an article of the same title prepared by the Office of the Staff Judge Advocate, USACIDC, that appeared in *The Army Lawyer*, Nov. 1978, at 14-17.

<sup>2</sup> 483 U.S. 435 (1987), *pet. for reh'g denied*, 483 U.S. 1056.

<sup>3</sup> Gen. Orders. No. 47, HQ, Dep't of Army (21 Sept. 1971).

<sup>4</sup> CID Reg. 195-1, Criminal Investigation: CID Operations, para. 5-21 (1 Nov. 1986) [hereinafter CIDR 195-1], requires that reports of investigation be coordinated with judge advocates to determine if the investigation is complete and sufficient in accordance with CID policies.

<sup>5</sup> See generally Army Reg. 190-53, Military Police: Interception of Wire and Oral Communications for Law Enforcement Purposes (1 Nov. 1978) [hereinafter AR 190-53].

<sup>6</sup> See generally 5 U.S.C.A. app. 3, § 6(a)(4) (West Supp. 1990).

<sup>7</sup> See generally Dep't of Defense Inspector General Memorandum, Subject: Criminal Investigations Policy Memorandum Number 5—Criminal Drug Investigative Activities, 1 Oct. 1987. One intent of the Memorandum is to prevent the military investigative agencies from violating the Posse Comitatus Act, 18 U.S.C. § 1385, by prescribing policies for the conduct of off-post drug operations targeting civilians.

<sup>8</sup> See generally Army Reg. 27-40, Legal Services: Litigation, Chapter 8—Remedies in Procurement Fraud and Corruption (4 Dec. 1985).

<sup>9</sup> 10 U.S.C. §§ 801-940 (1988).

<sup>10</sup> Army Reg. 195-2, Criminal Investigation: Criminal Investigation Activities, para. 1-5b (30 Oct. 1985) [hereinafter AR 195-2].

<sup>11</sup> AR 195-2, app. B, lists most of the offenses within CID investigative responsibility. CID also investigates noncombat deaths, offenses involving senior personnel (e.g., an active duty general), and aggravated assaults which result in hospitalization of the victim for more than 24 hours. AR 195-2, para. 3-3. Paragraph 3-3 also discusses other offenses that CID may investigate and places limits on CID investigation for selected offenses.

secondly toward identifying offenders.<sup>12</sup> For CID reporting or "titling purposes," identification of an offender results in titling when sufficient evidence becomes available to believe that person committed the offense.<sup>13</sup> Obviously, the standard of "probable cause to believe" is not as great as the standard of "beyond a reasonable doubt" for a conviction. Reviewing judge advocates should not use the latter standard in evaluating subject and founded<sup>14</sup> offense determinations in CID reports of investigation. Once an investigative report is completed with judge advocate review, the case is considered "closed." In cases where trial or defense counsel require further investigative effort before trial, the local CID office may be reluctant to commit limited CID manpower resources on a case considered "closed." This potential problem may be alleviated by judge advocates conducting a careful review of draft USACIDC reports of investigation prior to the agent's preparation of the report "in final."

By regulation, CID agents do not work for the local commander, the provost marshal, or the staff judge advocate.<sup>15</sup> They are centrally controlled by HQ, USACIDC, but exist to support all Army commanders. This Army investigative resource works to the benefit of all parties involved in the criminal justice process. CID develops facts about criminal offenses that can be used by all appropriate Army authorities. When CID responds to requests by defense counsel for further development of investigative leads, no confidential relationship exists between the CID agent and the defense counsel. If pursuit of leads provided by the defense results in evidence adverse to the defense, it will be provided to the government in the same way as evidence clearing the accused. There may not be many occasions when defense counsel will seek CID assistance, but defense counsel should not refuse to use the services and expertise of CID when the assistance would benefit their clients. Again, keep in mind that because of manpower and administrative constraints, CID special agents cannot interview every possible source of information, and every statement made to the agents cannot be reduced to writing. Good judgment, investigative expertise, and close coordination with sup-

porting judge advocates (both government and defense) should provide a complete and responsive CID report in every case.

### Special Investigative Techniques

Two special investigative techniques used by CID are the polygraph and electronic surveillance. Polygraph examinations are often used by CID special agents when a suspect requests or agrees to such an examination in an effort to convince the investigating agent that he or she is telling the truth. The polygraph examiner will then render one of the following opinions: 1) that the suspect told the truth (no deception indicated); 2) that the suspect did not tell the truth (deception indicated); or 3) that the test is inconclusive. The results of polygraph examinations often result in the suspect confessing to the CID polygraph examiner. The confession rate of suspects who run "deception indicated" is very high, often around eighty percent. Thus, the polygraph examination is a useful tool or technique that helps CID conduct investigations.

Defense counsel and their clients may request a polygraph for purposes of exculpation,<sup>16</sup> although any information gained by the CID polygraph examiner is not privileged. Additionally, the results of a polygraph examination may be admissible as evidence in a court-martial.<sup>17</sup> Although defense counsel will normally not be permitted in the actual examination room, a one-way window and a microphone (with the examinee's consent) permit counsel's close monitoring of the examination. Counsel may submit proposed questions to the polygraph examiner, who will review with the defense counsel and examinee all the questions to be asked during the examination. If a defense request for polygraph is denied, the denial may be appealed to HQ, USACIDC. To avoid the potential adverse consequences of a deception indicated opinion by a CID polygraph examiner, the defense counsel may first wish to use the services of a civilian polygraph examiner. Though the client must pay the civilian, the results of such an adverse examination may never be discovered by the trial counsel and therefore never be used against the client at trial. Unfortunately for the

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<sup>12</sup>CIDR 195-1, para. 4-1.

<sup>13</sup>CIDR 195-1, para. 7-6a.

<sup>14</sup>CIDR 195-1, glossary, defines a founded offense as: "[a] criminal offense, the commission of which has been substantiated by police investigation. The determination that a founded offense exists is made by the appropriate police agency and is not dependent on judicial decision."

<sup>15</sup>Army Reg. 10-87, Organization and Functions - Major Army Commands in the Continental United States, para. 4-2 (11 Apr. 1988). Of the approximately 2200 persons in USACIDC, only 1200 are criminal investigators (warrant, enlisted, or civilian).

<sup>16</sup>Army Reg. 195-6, Criminal Investigation: Department of the Army Polygraph Activities, para. 1-4c (1 Sept. 1980).

<sup>17</sup>United States v. Gipson, 24 M.J. 246 (C.M.A. 1987). For analysis of the *Gipson* decision, see Wittman, *United States v. Gipson: Out of the Frye Pan, Into the Fire*, The Army Lawyer, Oct. 1987, at 11. CID's staff judge advocate office indicates that the next change to the Manual for Courts-Martial will include a provision making the results of polygraph examinations inadmissible.

accused, however, favorable results from the civilian examiner may not be admissible at trial.<sup>18</sup>

The Army policy for electronic surveillance operations contains many policy and procedural constraints on the use of electronic surveillance that are not found in statutory or case law. Consider, for example, the consensual monitoring provisions of applicable Army guidance.<sup>19</sup> Federal law recognizes that so long as at least one of the parties (e.g., the undercover agent) to a conversation consents to monitoring or recording, there is no statutory prohibition against such monitoring.<sup>20</sup> AR 190-53, paragraph 2-5, however, requires one-party consensual monitoring to be approved by the Secretary of the Army, the Under Secretary, the Army General Counsel, or the DOD General Counsel or his designee. In emergency circumstances, the Army General Counsel is authorized to approve such monitoring on an interim basis. The CID RJA or the SJA, USACIDC, can provide further guidance on electronic surveillance operations and CID policies.

Consensual monitoring is often used in the conduct of undercover drug operations. A concealed transmitter is placed on the confidential informant (CI) or the undercover investigator who is about to buy the illegal drugs. The surveillance team can then overhear what is being said during the deal. If it appears that the alleged dealer is about to cause harm to the CI or undercover investigator, the surveillance team can rapidly respond. Additionally, the surveillance team can record what is being said. The recording or its transcript can be very useful to government and defense judge advocates. Consensual monitoring has also been used during economic crime investigations and sting operations.<sup>21</sup>

### Procurement Fraud

One area of increasing concern to the Army and CID is procurement fraud. Many special agents now investigate

economic crime (which includes procurement fraud) both on and off the military installation.<sup>22</sup> Major General Eugene R. Cromartie, former Commander, USACIDC, instituted a comprehensive training program to prepare CID special agents to investigate economic crime.<sup>23</sup> Since 1987, CID has recruited Department of the Army civilian special agents to assist military special agents in the investigation of major economic crime in defense procurement.<sup>24</sup> The CID civilian special agents concentrate on economic crime investigation involving major procurement actions. The military special agents rely upon the installation procurement fraud advisor for legal advice in the conduct of the economic crime investigation on the installation.

The investigation of major procurement fraud often takes over one year to complete. Reams of documents must be examined. Witnesses, including chief executive officers, subcontractors, and hourly employees, must be interviewed. Constant legal coordination with a procurement fraud advisor or with an Assistant U.S. Attorney who can prosecute or file a civil complaint is required. The payoff can be substantial. For example, Chief Warrant Officer Charles Moss spent three-and-a-half years investigating a major helicopter manufacturing company suspected of cost overcharging. The case involved more than 3,000 separate contracts. The payoff was an out-of-court settlement in which the helicopter maker paid \$90 million in funds, spare parts, and withdrawn claims.<sup>25</sup>

One of the major techniques used by CID special agents to obtain evidence of economic crime is the Department of Defense Inspector General (DODIG) subpoena. The DODIG subpoena is an administrative subpoena *duces tecum*. It may require only the production of documents and documentary data.<sup>26</sup> No testimony may be compelled. The DODIG issues the subpoena in support of criminal, civil, or administrative investigations in furtherance of the DODIG's function to prevent and

<sup>18</sup>United States v. McKinnie, 29 M.J. 825 (A.C.M.R. 1989).

<sup>19</sup>AR 190-53, para. 2-5.

<sup>20</sup>18 U.S.C. § 2511(2)(c) (d) (1988).

<sup>21</sup>See Nypaver, *Issues Raised in the Prosecution of an Undercover Fence Operation Conducted by the U.S. Army Criminal Investigation Command*, The Army Lawyer, Apr. 1982, at 1; see also Eisenberg, *Hercules Unchained: A Simplified Approach to Wiretap, Investigative Monitoring, and Eavesdrop Activity*, The Army Lawyer, Oct. 1980, at 1.

<sup>22</sup>See generally *On The Record—Major Gen. Eugene R. Cromartie, Commander, Criminal Investigation Command*, Army Times, Oct. 10, 1988, at 38. Major Gen. Cromartie stated that in 1984 CID opened about 1184 reports involving economic crime. The government recovered about \$15.9 million. In 1987, CID opened 1378 reports. The government recovered more than \$100 million in 1988. In 1983, CID had 50 full-time economic crime special agents. By the end of fiscal year 1989, he states there will be 226 economic crime agents.

<sup>23</sup>Miles, *Soldiers' Lives and Contract Fraud*, Soldiers, July 1989, at 34-35.

<sup>24</sup>*On the Record*, supra note 22. Approximately 81 of the economic crime agents are civilians.

<sup>25</sup>Miles, supra note 23.

<sup>26</sup>5 U.S.C.A. app. 3, § 6(a)(4) (West Supp. 1990).

detect fraud, waste, and abuse in the programs and operations of the DOD.<sup>27</sup> Use of the DODIG subpoena permits the documents obtained to be used to support all of the civil, administrative, contractual, and criminal remedies. Grand jury secrecy problems, engendered by the use of grand jury subpoenas, are avoided.<sup>28</sup> Criminal Investigation Command Regulation (CIDR) 195-1 contains the procedures used to request the issuance of a DODIG subpoena.<sup>29</sup>

### Increased Off-Post Investigations

Since 1978, when the original version of this article appeared in *The Army Lawyer*, two court decisions increased CID's role in off-post investigations. The first decision was *United States v. Trottier*.<sup>30</sup> In *Trottier* the Court of Military Appeals ruled an airman's off-post sales of illegal drugs were "service connected" within the meaning of that term as used in *O'Callahan v. Parker*.<sup>31</sup> Thus, *Trottier* gave renewed emphasis to the activities of CID in the investigation of off-post drug offenses. Members of a CID's drug suppression team (DST), after coordination with local civil law enforcement activities, began working off-post to investigate illegal drug offense committed by soldiers. Such investigations, however, often led to the involvement of CID undercover agents with civilians who dealt in illegal drugs.

When the identified civilian drug dealers were subsequently arrested and brought to trial by the civil authorities, the defense often alleged that there had been violations of the Posse Comitatus Act.<sup>32</sup> At least two courts suppressed evidence because of such violations.<sup>33</sup> To minimize such problems, the Department of Defense Inspector General issued a policy memorandum in 1985 to all the military investigative services under its supervisory jurisdiction.<sup>34</sup> This memorandum, often referred

to as "Policy 5" by CID, restricts CID's off-post drug investigations involving civilian suspects. Because of the memorandum, CID can only "target" or direct an investigation against a civilian drug dealer if CID has reasonable grounds to believe 1) that the civilian is the source of the introduction of illegal drugs onto a military installation; or 2) that the civilian deals in illegal drugs with soldiers. Permission to target the civilian has to be obtained from the CID region commander after the RJA conducts a legal review of the request. Implementation of Policy 5 has controlled the targeting of civilians by CID drug suppression teams and has prevented Posse Comitatus Act problems.

The second court decision that affected CID off-post investigations was *United States v. Solorio*.<sup>35</sup> After the United States Supreme Court's decision in *Solorio*, many thought that CID's workload would increase as a result of CID's expanded involvement in the investigation of all "off-post" offenses committed by soldiers.<sup>36</sup> In fact, however, an Army regulation had previously permitted CID to investigate offenses occurring off-post where there was concurrent law enforcement jurisdiction. Therefore, the actual number of off-post investigations did not increase as dramatically as many expected. In situations of concurrent jurisdiction, coordination between the federal, state, and local civil law enforcement authorities determined which agency had primary responsibility.<sup>37</sup> In the event of a dispute over the responsibility to investigate, the Army regulation permitted independent investigations by each law enforcement agency.<sup>38</sup> CID's practice for most off-post offenses was to obtain a copy of the civil law enforcement report and then prepare its own report of investigation, using the civil law enforcement's copy as the basis for CID's report.<sup>39</sup> Routinely, little additional investigative work was required. Since 1987, however, Army commanders

<sup>27</sup> *United States v. Art Metal U.S.A., Inc.*, 484 F. Supp. 884 (D.N.J. 1980). The subpoena is enforced by contempt proceedings. See *United States v. Westinghouse Elec. Corp.*, 615 F. Supp. 1163 (W.D. Pa. 1985), *aff'd*, 788 F.2d 164 (3d Cir. 1986); 5 U.S.C.A. app. 3, § 6(a)(4) (West Supp. 1990).

<sup>28</sup> See generally Fed. R. Crim. P. 6(e) for the general rule of secrecy and its exceptions.

<sup>29</sup> CIDR 195-1, paragraph 5-33d. See Nypaver, *Department of Defense Inspector General Subpoena*, *The Army Lawyer*, Mar. 1989, at 17 (additional information regarding the subpoena and how to obtain it).

<sup>30</sup> 9 M.J. 337 (C.M.A. 1980).

<sup>31</sup> 395 U.S. 258 (1969). In *O'Callahan*, the Supreme Court ruled that a court-martial lacked jurisdiction over the offense charged against a servicemember unless the offense was "service connected." In further decisions, such as *Relford v. Commandant*, 401 U.S. 355 (1971), and *Schlesinger v. Councilman*, 420 U.S. 738 (1975), the Supreme Court further defined the term "service connected." In *United States v. Alef*, 3 M.J. 414 (C.M.A. 1977), the Court of Military Appeals required a case-by-case analysis of the twelve *Relford* factors to determine if a court-martial had jurisdiction over the offense. *Alef* also led to the practice of alleging jurisdictional factors in the specification of the offense.

<sup>32</sup> 18 U.S.C. § 1385 (1988). For a discussion of how civilian defendants used the Posse Comitatus Act as a defense, see Hilton, *Recent Development Relating to the Posse Comitatus Act*, *The Army Lawyer*, Jan. 1983, at 1, 7.

<sup>33</sup> *Taylor v. State*, 645 P.2d 522 (Okla. Crim. App. 1982), and *People v. Burden*, 94 Mich. App. 209, 288 N.W.2d 392 (1979).

<sup>34</sup> Dep't of Defense Inspector General Memorandum, Subject: Criminal Investigations Policy Memorandum 5—Criminal Drug Investigation Activities, 1 Oct. 1987.

<sup>35</sup> 483 U.S. 435 (1987).

<sup>36</sup> In *Solorio* the Supreme Court overruled the "service-connection" doctrine established in *O'Callahan v. Parker*, 395 U.S. 258 (1969). Now, a court-martial has subject-matter jurisdiction over all offenses committed by a servicemember.

<sup>37</sup> AR 195-2, para. 3-2a.

<sup>38</sup> *Id.*

<sup>39</sup> Such a report of investigation is referred to as a "collateral" one. See AR 195-2, para. 1-5m.

and staff judge advocates have been more apt to ask CID to investigate off-post offenses, especially when they have not been investigated by civil law enforcement agencies.

### Coordination of Reports of Investigation

As most judge advocates in the field are aware, the most routine form of contact with CID is "JAG coordination" by the CID agent during case finalization. The purpose of coordination with a judge advocate is "to determine if the investigation is complete and sufficient for legal purposes. For investigative purposes, legal sufficiency is primarily concerned with whether: 1) an individual is properly titled as a subject (probable cause exists); and 2) the offense is properly shown as founded."<sup>40</sup>

Unfortunately, communication failures sometimes occur in judge advocate coordination. A lack of understanding of CID policies is often the basis of the problem. Too often the judge advocate in the field erroneously believes that a case is founded only if the offender can be prosecuted before a court-martial. The CID special agent, on the other hand, is concerned primarily with the investigation of the case in accordance with CID's investigative policies, which require the establishment of facts sufficient to support probable cause to title.<sup>41</sup> An understanding of CID policies, good communications, and a good working relationship between CID and judge advocates should enable them to resolve their differences. Additionally, difficulties in judge advocate coordination should be referred to the CID RJA for assistance and resolution.

All CID reports of investigation are filed in the U.S. Army Crime Records Center (CRC) in Baltimore, Maryland. Those that title an offender or identify a victim are indexed in the Defense Central Investigation Index (DCII).<sup>42</sup> Several important policies regarding inves-

tigating offenses and reviewing and filing reports of investigation should be noted. USACIDC is required to provide a complete and legally sufficient report of investigation for all criminal offenses that are of Army interest, that are within its investigative authority or responsibility, and that are investigated by the command.<sup>43</sup> Although the Army often requires complete reports on criminal offenses that are beyond its authority to prosecute, a legal review of the report is required whenever a subject is listed. For example, advice on whether an offense is "founded" should not be limited to the offense on which the special agent is seeking advice. The judge advocate should include advice on any other offense substantiated by the facts. Also, an illegal search does not mean an offense was not committed (founded); it merely means evidence so seized is not admissible in any subsequent judicial proceeding. Obviously an "offense" cannot be founded if the violation is only administrative (nonpunitive) in nature, and a civilian subject cannot be listed for violation of the UCMJ. The CID special agent will often need specific assistance of the field judge advocate in determining applicable criminal law whenever an unusual offense occurs or a civilian suspect is identified. Additionally, the results of polygraph examinations may be used to determine whether an offender should be listed or titled as the subject.

CRC maintains files on subjects who appear in Military Police and CID reports. Thus, the names of soldiers, civilians, and corporations who have committed a serious crime against the Army will be on file. CRC maintains the paper file of reports of investigation for three years. Thereafter, CRC converts the paper file to microfiche and retains the microfiche for thirty-seven more years.<sup>44</sup> CRC has more than 5.3 million different names contained in its files<sup>45</sup> and receives requests to perform between 15,000 and 17,000 name checks per month.<sup>46</sup> A name check requires CRC to conduct a search of its available files and indexes to determine if information pertaining

<sup>40</sup>CIDR 195-1, para. 5-21.

<sup>41</sup>CIDR 195-1, glossary (C4, 22 Feb. 1988):

Probable cause to title a person or an entity in a criminal investigation exists when, considering the quality and quantity of all available evidence, without regard to its admissibility in a court of law, the preponderance of the evidence points toward the commission of a crime by a particular person or entity and would cause a reasonable and prudent person to believe that the person or entity committed the crime. It does not rise to the level of proof beyond a reasonable doubt. The existence of probable cause to title is a determination made by the investigating organization.

<sup>42</sup>AR 195-2, para. 5-2.

<sup>43</sup>Once CID initiates a criminal investigation, only the Secretary of the Army and the DODIG (in selected cases) may direct that the investigation be delayed, suspended, or terminated. Dep't of Defense Instruction No. 5505.3, Initiation of Investigations by Military Criminal Investigative Organizations (July 11, 1986). The Instruction, in paragraph D4, also directs that commanders shall not impede the use of permissible investigative techniques, such as sting operations and undercover drug operations, which CID considers to be necessary.

<sup>44</sup>Collins, *Crime Over Time*, Soldiers, July 1988, at 32.

<sup>45</sup>*Id.*

<sup>46</sup>*Id.*



to the individual is on file.<sup>47</sup> Name checks reveal a prior record of the subject as well as investigative leads for the CID special agent to follow. For example, a recent case concerning a soldier murdered in Europe appeared to be unsolvable. The CID special agent requested a name check on a couple who had talked with the victim earlier on the day of the offense. The name check revealed that the husband had a record of murder and rape. Upon subsequent questioning, he confessed.<sup>48</sup>

Formal requests for access to, or amendment of, CID records under the Freedom of Information Act, the Privacy Act, or the provisions of AR 195-2, Criminal Investigation Activities, should be addressed to the U.S. Army Crime Records Center in Baltimore, Maryland.<sup>49</sup> Usually, requests are of two types: 1) requests for amendment; and 2) requests to delete a person's name from the title block. A request for amendment will be granted only if the requestor "submits new, relevant, and material facts that are determined to warrant revision of the report."<sup>50</sup> The requester has the burden of proof to justify the amendment. A request to delete a name from the title block "will be granted if it is determined that probable cause does not exist to believe that the individual committed the offense for which titled as a subject."<sup>51</sup>

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<sup>47</sup> AR 195-2, paras. 5-3 and 5-4.

<sup>48</sup> Collins, *supra* note 44.

<sup>49</sup> AR 195-2, para. 4-4; *see also* AR 195-2, paras. 5-5 and 5-6.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* para. 4-3.

<sup>54</sup> *Id.*

<sup>55</sup> One area of increasing interest to CID are determinations under applicable state law as to whether CID special agents are law enforcement officers. The issue often arises when a CID special agent seeks to obtain a search warrant from a state judge or magistrate. In the federal system, Fed. R. Crim. P. 41(a) authorizes the issuance of a search warrant "upon request of a federal law enforcement officer." 28 C.F.R. § 60.3 (1989) expressly recognizes CID special agents as law enforcement officers for the purpose of obtaining search warrants using Fed. R. Crim. P. 41.

The Commanding General, USACIDC, or his designee possess the discretion to make any changes.<sup>52</sup> The Privacy Act also regulates release of personal information to third parties. By necessity, USACIDC reports of investigation are disseminated within the Army to personnel with a "need to know."<sup>53</sup> In cases involving release of CID records for claims or civil litigation purposes, U.S. Army Crime Records Center coordination is required for authorized release.<sup>54</sup>

### Conclusion

These brief observations are intended to reintroduce the judge advocate to CID and to reinforce the close relationship existing between judge advocates and CID special agents. As in any relationship, it is a simple matter to end up at cross purposes—primarily because of the failure to communicate effectively and to understand each other. The information provided above should help judge advocates understand and work together with CID special agents. Recent court decisions and an emphasis on investigating economic crime have increased CID's role. Now, more than ever, CID and judge advocates need to work together to provide for effective investigation and subsequent criminal or civil prosecution.<sup>55</sup>

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## Commercial Sponsorship: Salvation for Army Morale, Welfare, and Recreation Programs or Shortsighted Folly?

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### Introduction

On 29 February 1988, the Assistant Secretary of Defense, Force Management and Personnel, issued a

memorandum<sup>1</sup> that authorized the Army and the other military services to develop commercial sponsorship programs. Such programs had previously been prohibited by the longstanding rules set forth in Department of Defense

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<sup>1</sup>Memorandum, Assistant Secretary of Defense, Force Management and Personnel, subject: Commercial Sponsorship of Morale, Welfare and Recreation (MWR) Events, 29 Feb. 1988, [hereinafter Assistant Secretary of Defense Memorandum].

(DOD) Instruction 1015.2.<sup>2</sup> Pursuant to the memorandum, the military services could institute plans, subject to DOD approval, to solicit commercial sponsorship from U.S. firms. This authorization was subject to four limitations: 1) sponsors had to be solicited competitively from all known U.S. sources; 2) tobacco and alcoholic beverage sponsorship could not be solicited, but if offered, such sponsorship could be accepted if the company spontaneously offered similar promotions in the civilian community and did not target only the military market; 3) the obligations of DOD and commercial sponsors had to be set forth in written one-year agreements, with up to four additional one-year options; and 4) the services could not endorse or favor any commercial product, supplier, or service, and they had to require appropriate disclaimers.<sup>3</sup> The test period was originally for a period of one year, but it has recently been extended for an indefinite period until DOD can determine whether or not to retain the program permanently.<sup>4</sup>

The solicited commercial sponsorship program in the Army was approved by DOD on 22 December 1988.<sup>5</sup> Since its inception, the solicited commercial sponsorship program has been controversial. On the one hand, the program has assisted many Army installations and activities in upgrading the quality of athletic events; festivals; and similar morale, welfare, and recreation (MWR) activities. On the other hand, the program has been hampered by concerns regarding its scope, the means of implementation, and numerous standards of conduct and contracting issues.

### Limitations

The purpose behind the test program in the Army was to override existing policies that might have inhibited "the services' ability to offer quality events that will be possible if organized and/or underwritten by a commercial company."<sup>6</sup> This program is particularly important in the constrained budgetary climate that now exists in

the MWR arena. The program was seen as a means of responding to the exhortations of the House Armed Services Committee to operate MWR activities in a businesslike manner.<sup>7</sup>

The Army's plan was brief and was written in general terms to allow installations as much flexibility as possible. The Army's plan was based upon the Navy plan, which DOD had approved for use in mid-1988.<sup>8</sup> Many individuals involved in the drafting of the Army plan would have preferred a more comprehensive instrument, but such a document would have taken months to prepare and staff. This delay would have prevented the Army from benefitting from the program during what was, at that time, believed to be a one-year test period. The drafters feared that any attempt to anticipate and address all the potential problems would result in an inflexible document that would greatly inhibit the growth of the program.

The Army plan attempted to fill in many of the gaps contained in the original DOD guidance. Success was incomplete. The following are among the more important elements of the Army implementation plan:

- a. In OCONUS areas, sponsorship may be solicited from non-U.S. sources if no U.S. sources exist or if U.S. sources are inadequate.
- b. Events must be consistent with "Army goals and objectives" and, where appropriate, geared to the Army family.
- c. Multiple sponsorship of like or different products and/or services may be solicited.
- d. Resale of products provided at the event will be conducted by installation nonappropriated fund instrumentalities (NAFI's) or by concession contract if the NAFI is unable to perform the service, subject to approval by the installation commander. Only NAFI's are allowed to sell alcoholic beverages on installations.

<sup>2</sup>Dep't of Defense Instruction No. 1015.2, Operational Policies for Morale, Welfare and Recreation (MWR) Activities (May 17, 1985) [hereinafter DOD Instr. 1015.2]. This instruction is currently under revision, as are several other DOD directives dealing with morale, welfare, and recreation activities. It is anticipated that this new consolidated directive will be staffed throughout DOD later this year.

<sup>3</sup>Assistant Secretary of Defense Memorandum, *supra* note 1.

<sup>4</sup>Memorandum, Assistant Secretary of Defense, Force Management and Personnel, subject: Commercial Sponsorship of Morale, Welfare and Recreation (MWR) Events, 8 Jan. 1990.

<sup>5</sup>Memorandum, Deputy Assistant Secretary of Defense, Military Manpower and Personnel Policy, subject: Commercial Sponsorship of Morale Welfare and Recreation (MWR) Events, 22 Dec. 1988 [hereinafter Deputy Assistant Secretary Memorandum]. The Army proponent for this implementation is the U.S. Army Community and Family Support Center, Program Analysis and Evaluation Directorate. Installation personnel may direct any policy questions concerning the program to Ms. Margaret McMullen. Ms. McMullen can be reached at AUTOVON 221-9370. The Community and Family Support Center has also hired a program manager, Ms. Kate Spenser, to advise Army installations on effective ways to establish and manage sponsorship programs. Ms. Spenser can be contacted at AUTOVON 221-6789.

<sup>6</sup>Memorandum, Director, Program Analysis and Evaluation Office, U.S. Army Community and Family Support Center, subject: Solicited Commercial Sponsorship of Army MWR Authorized Special Events, 15 July 1988.

<sup>7</sup>H. Rep. No. 110-563, 100th Cong., 2d Sess. 197.

<sup>8</sup>The Navy plan was approved by LTG Lukeman, the Deputy Assistant Secretary of Defense, Military Manpower and Personnel Policy, in a memorandum entitled, "Commercial Sponsorship of Morale, Welfare and Recreation (MWR) Events," on 30 August 1988. The Air Force is presently developing their own version of a solicited commercial sponsorship program for submission to DOD.

e. Admission charges are permitted at sponsored activities. Any such charges will be collected and accounted for by the installation NAFI hosting the event.

f. The sponsor's contribution of services, funds, or products may be acknowledged. The sponsor's name, logo, or trademark may be used in conjunction with the event in promotional materials.

g. A sponsor's name may not be used in the title of the event. A sponsor, however, may be acknowledged in the following manner: "Fort ABC Fun Run, sponsored by the XYZ Company."

h. Disclaimers are required at events or posted on all written materials clearly stating that the Army does not officially endorse the sponsor's name, product, or service.

i. Sponsored events will be in compliance with federal laws and regulations. In overseas areas, international treaties and agreements will be observed.<sup>9</sup>

In addition to the guidance set forth above, the Army plan also included a sample letter to be used in soliciting sponsors and a sample sponsorship agreement patterned closely after that used by the Navy. These sample documents need not be used in every case. In fact, installation judge advocates or program managers will probably want to modify the sample sponsorship documents extensively in virtually all cases to accurately memorialize agreed terms and to adequately protect the government and installation NAFI's.

It is important to note what the solicited commercial sponsorship test program is not. The program involves solicited sponsorship only. It does not apply to unsolicited gifts to the Army, gifts for distribution to individuals, or foreign gifts, which are governed by Army Regulations 1-100,<sup>10</sup> 1-101,<sup>11</sup> and 672-5-1,<sup>12</sup> respectively. The program is inapplicable to gifts to a NAFI, which are controlled by AR 215-1, paragraphs 3-14 k and w.<sup>13</sup> Nor does the program apply to unsolicited NAF or appropriated fund contract proposals. Such proposals are regulated by AR 215-4, paragraph

4-42,<sup>14</sup> and FAR subpart 15.5,<sup>15</sup> respectively. The program, by its terms, is limited to providing support to athletic events, festivals, competitions, and similar MWR activities. The program does not exist to fund ongoing activities. Thus, efforts to upgrade the furnishings of government offices under the guise of seeking sponsorship of a community festival (someone actually tried to do this) would be outside the scope of the solicited commercial sponsorship program.

### Program Success

At present, the U.S. Army Community and Family Support Center is attempting to gather information from Army installations regarding their experiences with the solicited commercial sponsorship program. While the results of the survey are not yet complete, it is clear that the program has been used at a number of installations to improve the quality of MWR programs. At the installation level, solicited commercial sponsorship has been used to provide awards and refreshments for sporting events, fund entertainment acts at community festivals, and obtain promotional items (e.g., balloons, posters, and t-shirts) for post carnivals. At the DA staff level, sponsorship is currently being sought for such events as the Armed Forces Sports Championships, the Army Soldier Show, the Better Opportunities for Single Soldiers (BOSS) Program, and the 25th Anniversary Celebration of Army Community Services.

### Problem Areas

Based on discussions among U.S. Army Community and Family Support Center legal advisors, program proponents, and NAF contracting personnel and their counterparts at the installation and major command levels, it would appear that the solicited commercial sponsorship test program suffers from a number of conceptual, ethical, and operational problems. The program cannot truly succeed until these problems are overcome.

One recurring concern with the program is the nature of the agreements signed by sponsors. It is clear that the DOD-approved Army sample sponsorship agreement is

<sup>9</sup>Memorandum, Director, Program Analysis and Evaluation Directorate, U.S. Army Community and Family Support Center, subject: Solicited Commercial Sponsorship of Army MWR Events, 30 Jan. 1989.

<sup>10</sup>Army Reg. 1-100, Gifts and Donations (15 Nov. 1983).

<sup>11</sup>Army Reg. 1-101, Gifts for Distribution to Individuals (1 May 1981).

<sup>12</sup>Army Reg. 672-5-1, Military Awards (12 Apr. 1984).

<sup>13</sup>Army Reg. 215-1, The Administration of Army Morale, Welfare and Recreation Activities and Nonappropriated Fund Instrumentalities, paras. 3-14 k and w (6 Nov. 1988).

<sup>14</sup>Army Reg. 215-4, Nonappropriated Fund Contracting, para. 4-42 (4 Nov. 1988).

<sup>15</sup>Fed. Acquisition Reg. 15.5 (1 Apr. 1984).

not a NAF contract as that term is usually understood. Such agreements do not contain the usual Changes, Termination, or Disputes clauses; nor do they include the many statutory provisions generally set out in NAF contracts, such as those prohibiting the use of convict labor, kickbacks, or the acceptance of gratuities by government personnel. Finally, such agreements do not require execution by appropriated fund or NAF contracting officers. Despite the fact that sponsorship agreements do contain mutual promises by two parties, these agreements do not commit Army nonappropriated funds. Thus, it would appear that commercial sponsorship agreements are outside the scope of AR 215-4. Certainly, such agreements were not contemplated by the drafters of that regulation.

A related question concerns the role of NAF contracting personnel in the program. Because management of the program involves a number of activities in which contracting personnel are skilled—such as preparing solicitations, negotiating with others, selecting the most qualified offeror, and preparing binding agreements—one would think that NAF contracting officers (and their lawyers) should be involved. On the other hand, participating in the program could place installation contracting personnel in an awkward position. Conflict of interest issues may arise if a contracting officer solicits a potential sponsor for some free merchandise under the program and subsequently attempts to negotiate a contract with the same business. If trained contracting officers are excluded from acting in the program, however, who else on a typical installation would possess the necessary training to solicit sponsors and negotiate a valid agreement? While activity managers and installation marketing directors will often be familiar with possible sources of sponsorship and will know the type of merchandise that will appeal to the military community, such individuals often lack the experience and training required to negotiate with sponsors and draft adequate written agreements. At most installations, it would be impossible to find anyone who has the needed technical expertise and yet is not included in day-to-day contracting activities.

Another concern flows from the DOD requirement that agreements under the program be written for a minimum period of one year.<sup>16</sup> Up to four additional one-year option periods are also allowed. This does not appear to make much sense. It is not readily apparent why an

agreement should be drafted for a period of one year when performance under the agreement is expected to take place in a shorter period of time. For example, an agreement signed on June 1 to supply streamers and confetti for a Fourth of July celebration would most likely be fully carried out on July 4.

A fourth problem concerns how NAFI's can comply with the DOD direction to solicit sponsors "from all known U.S. sources."<sup>17</sup> It is unclear what this phrase means. If the phrase means what it literally says, it cannot be followed. For example, if an installation wishes to obtain gift certificates from a fast food restaurant for use as awards at a softball tournament, it would be prohibitively expensive and probably impossible to solicit every fast food restaurant in the country. It can be argued that the word "known" is a word of limitation that should be read as "known to be practical." Under such a reading, a NAFI might only have to solicit those fast food establishments within a reasonable distance from the installation. In any event, this issue needs to be clarified by DOD. Certainly the requirement to advertise and announce solicitation opportunities so as to reach all known sources should be eliminated. In my view, the best resolution of this concern would be to apply a sliding scale to the amount of competition required. For solicitations of small amounts of inexpensive items, limited competition of three to five sources should be sufficient. Sources could be rotated periodically to give everyone who wanted to compete a chance for an award. On the other hand, solicitations involving high value items should place much greater emphasis on widespread competition. To this end, AR 215-4, paragraph 1-11, could be used as a starting point to formulate a new policy concerning competition requirements in the program.

A fifth concern arises from the DOD requirement that only "U.S. sources" may be solicited.<sup>18</sup> This problem is exacerbated by the DA guidance that in OCONUS areas, sponsorship may be solicited from "non-U.S." sources if "no or inadequate" U.S. sources exist. Such vague wording raises a great many questions to attorneys attempting to give concrete advice. An attorney, for example might ask: What is a "U.S. source?" Is this term defined by analogy to the Buy American Act,<sup>19</sup> Trade Agreements Act of 1979,<sup>20</sup> or some other statute? Who decides if U.S. sources are not available? What standard defines availability? Does "OCONUS" include Hawaii? Clearly, there are a number of questions caused

<sup>16</sup> Assistant Secretary of Defense Memorandum, *supra* note 1.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> 41 U.S.C. § 10a-10d (1982 & Supp. V 1987).

<sup>20</sup> 19 U.S.C. § 2511 (1988).

by the inexact nature of existing program guidance that need to be resolved during review of the test program.

Another possible problem, at least in a conceptual sense, is the manner in which the program turns the time-honored DOD and DA policy pertaining to the endorsement of commercial ventures on its head. For example, DOD support of off-post public events is limited by a proscription against any direct or indirect endorsement, selective benefit, or the appearance of such benefits to any commercial venture.<sup>21</sup> Likewise, community relations directives prohibit entertainers appearing on military installations from promoting the group's objectives in any manner, before, during, or after the entertainment.<sup>22</sup> Because the DOD edict creating the program only granted an exception to DOD Directive 1015.2, the question arises as to whether the program also supersedes public affairs based restrictions on certain aspects of the program. To my knowledge, this issue has never been directly addressed.

Perhaps the most persistent objections to the solicited commercial sponsorship test program arise from attorneys at Army installations, particularly contract attorneys and ethics counselors. The contract attorneys typically object that they neither understand the program nor know what rules to apply. Further, they complain that the program, by focusing on making a quick buck, may be ignoring possible future costs that could arise from bid protests by DOD contractors. Given the dire plight of many DOD contractors caused by reduced defense spending and the concomitant increase in litigiousness by such contractors, it is not hard to imagine bid protests being lodged against defense contracts awarded to firms who are active in the program, on the basis that their participation has given them an improper advantage. Such bid protests could tie up important defense contracts and generate high litigation expenses for the government. I would point out that, even in its current infant state, solicited commercial sponsorship can involve large sums of money. For example, CFSC is currently engaged in efforts to raise in excess of \$500,000 from sponsors for the Army Soldier Show. Because of the sums involved in the Soldier Show solicitation, many of the firms being solicited are major defense contractors. In modifying its policy on this issue, DOD may wish to consider excluding certain categories of defense contractors from participation in the program.<sup>23</sup> Alternatively, DOD may wish to limit participation to those firms that produce only consumer goods.

Ethics counselors typically complain that the solicited commercial sponsorship program is unseemly, involves at least the appearance of impropriety in violation of ethics rules,<sup>24</sup> and may undermine the integrity of the DOD contracting process. Such problems are particularly serious when large amounts of money are involved or when certain highly desirable sponsors, such as athletic shoe or soft drink distributors, are repeatedly importuned for sponsorship. These issues have been addressed in the legal reviews of the test program by the DA<sup>25</sup> and DOD<sup>26</sup> General Counsel. These reviews, while cautioning on the need to comply with ethics directives, nonetheless found the test program to be legally unobjectionable. In my view, these ethical issues need to be reexamined during review of the results of the test program. For the present, attorneys should be very sensitive to potential contracting and standards of conduct issues when reviewing commercial solicitation packets. Attorneys can also help protect their commanders from embarrassment by considering how installation sponsorship plans would look if published in the local press. For example, it is probably not a good idea for an installation to seek commercial sponsorship from a soft drink manufacturer at the same time that the installation is negotiating a new soft drink contract for its MWR activities.

Installation personnel working on the solicited commercial sponsorship program should be aware that commercial firms who participate in the program are generally not participating out of pure generosity. Most expect something in return. The great majority of such firms will be satisfied with the added exposure to the military market that they are entitled to under sponsorship agreements. Some companies, however, may want more. It should not surprise anyone if a sponsor tries to get onto the calendar of senior installation personnel for the alleged purpose of discussing their sponsorship activities. Furthermore, it should shock no one if the same sponsors subtly transform such meetings into sales pitches for the firms' commercial products. This has already happened at one installation. In another instance, a government employee was approached by a defense contractor during negotiations for a commercial sponsorship package to ascertain what the contractor could "really" expect to gain from participation in the program. The lesson to be learned from such shenanigans is that ethics counselors may wish to give special emphasis in training personnel involved in the solicited commercial sponsorship program.

<sup>21</sup>Dep't of Defense Directive No. 5410.18, Community Relations (3 July 1974), sec. B2 [hereinafter DOD Dir. 5410.18]; see also Army Reg. 360-61, Community Relations, para. 2-3 (15 Oct. 1980) [hereinafter AR 360-61].

<sup>22</sup>DOD Dir. 5410.18, sec. B2c. See also AR 360-61, para. 2-3 (1).

<sup>23</sup>See, e.g., 10 U.S.C. § 2397(b)(2) (1988).

<sup>24</sup>See Army Reg. 600-50, Standards of Conduct for Department of the Army Personnel (28 Jan. 1988).

<sup>25</sup>Memorandum, Department of the Army, Office of the General Counsel, subject: Commercial Sponsorship of Morale, Welfare and Recreation (MWR) Events (6 June 1988).

<sup>26</sup>Memorandum, Department of Defense, Office of the General Counsel, subject: Commercial Sponsorship of Morale, Welfare and Recreation (MWR) Events, 9 Aug. 1989.

## Summary

The Army has been implementing the DOD solicited commercial sponsorship test program since December 1988. While the program has the potential to raise sig-

nificant sums of money for Army MWR events, a number of concerns still need to be addressed. Attorneys at Army installations and major commands should be actively involved in the program and should be alert for problems that may arise.

## Obstruction of Federal Audit (18 U.S.C. § 1516): New Protection for the Federal Auditor

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### Introduction

Reflecting a continuing concern over the widespread scope of procurement fraud against the United States, Congress enacted a series of laws designed to provide the government with enhanced criminal and civil remedies to target and reduce that fraud.<sup>1</sup> One such measure, passed as part of the Anti-Drug Abuse Act of 1988<sup>2</sup> and codified at 18 U.S.C. 1516, is an obstruction of federal audit statute. This statute makes it a crime to influence, obstruct, or impede a federal auditor in the performance of official duties.<sup>3</sup> Section 1516 carries a maximum punishment of imprisonment for five years and a fine of \$250,000 for an individual and \$500,000 for an organization.<sup>4</sup>

The purpose of this article is to provide a brief analysis of section 1516 for procurement fraud advisors and others whose duties may involve procurement fraud or government contracting issues. The elements necessary to prove a violation of section 1516 are identified and discussed, and a number of factual scenarios are presented to illustrate the scope of the statute. Because section 1516 has yet to be the subject of judicial interpretation, the conclusions reached in this article are largely derived from an examination of the cases construing analogous

obstruction of justice statutes and from a review of the legislative history of section 1516.

### Legislative History

The legislative history of section 1516 reflects that the statute was designed to provide federal auditors with the "same protection for obstruction that the investigator, administrative proceedings, and the grand jury have in sections 1503, 1505, 1510, and 1512 of title 18 of the United States Code."<sup>5</sup> Congress felt that this protection was warranted because "in many successful investigations, government contractors have been able to avoid earlier detection by obstructing audits."<sup>6</sup> Accordingly, section 1516 "prohibits a wide range of obstructive conduct such as destruction ... [or] fabrication of documents as well as intimidation of witnesses and contractor employees ... ."<sup>7</sup>

The legislative history and current federal law on obstruction of justice suggest that section 1516 applies to an endeavor to influence, obstruct, or impede a federal audit by fabricating (to include making a false statement or giving false testimony),<sup>8</sup> altering,<sup>9</sup> destroying,<sup>10</sup> or concealing<sup>11</sup> information; threatening an auditor;<sup>12</sup> offer-

<sup>1</sup>E.g., Program Fraud Civil Remedies Act of 1986, Pub. L. No. 99-509, 100 Stat. 1934 (1986); Major Fraud Act of 1988, Pub. L. No. 100-700, 102 Stat. 4631 (1988).

<sup>2</sup>Pub. L. No. 100-690, § 7078, 102 Stat. 4181 (1988).

<sup>3</sup>18 U.S.C. § 1516 (1988), Obstruction of Federal Audit, provides:

(a) Whoever, with intent to deceive or defraud the United States, endeavors to influence, obstruct, or impede a Federal auditor in the performance of official duties relating to a person receiving in excess of \$100,000, directly or indirectly, from the United States in any 1 year period under a contract or subcontract, shall be fined under this title, or imprisoned not more than 5 years, or both.

(b) For purposes of this section the term "Federal auditor" means any person employed on a full- or part-time or contractual basis to perform an audit or a quality assurance inspection for or on behalf of the United States.

<sup>4</sup>18 U.S.C. § 1516; 18 U.S.C. § 3571 (1988).

<sup>5</sup>134 Cong. Rec. S17371 (daily ed. Nov. 10, 1988). Neither the House nor the Senate produced a report to accompany the Anti-Drug Abuse Act of 1988.

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>*See, e.g.,* United States v. Laurins, 857 F.2d 529 (9th Cir. 1988); United States v. Langella, 776 F.2d 1078 (2d Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986); United States v. McComb, 744 F.2d 555 (7th Cir. 1984).

<sup>9</sup>*See, e.g.,* United States v. Faudman, 640 F.2d 20 (6th Cir. 1981).

<sup>10</sup>*See, e.g.,* United States v. Shannon, 836 F.2d 1125 (8th Cir. 1988); United States v. McKnight, 799 F.2d 443 (8th Cir. 1986).

<sup>11</sup>*See, e.g.,* United States v. Lench, 806 F.2d 529 (9th Cir. 1986).

<sup>12</sup>*See, e.g.,* United States v. Fagan, 821 F.2d 1002 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 697 (1988).

ing an auditor bribes or gratuities;<sup>13</sup> or threatening or otherwise encouraging a third party not to cooperate with an auditor.<sup>14</sup>

### Elements of the Offense

The following five elements must be present to support a conviction under section 1516:<sup>15</sup> 1) the federal auditor must be in the performance of official duties; 2) those official duties must relate to a person or organization receiving in excess of \$100,000, directly or indirectly, from the United States in any one-year period under a contract or subcontract; 3) the defendant must know that an auditor was in the performance of official duties;<sup>16</sup> 4) the defendant must endeavor to influence, obstruct, or impede the federal auditor in the performance of his or her official duties; and 5) the defendant must act willfully, with the intent to deceive or to defraud the United States.<sup>17</sup>

### Federal Auditor

Subsection 1516(b) broadly defines the term "federal auditor" to include any person "employed on a full- or part-time or contractual basis to perform an audit or a quality assurance inspection for or on behalf of the United States."<sup>18</sup> While clearly encompassing traditional government contract auditors, such as those from the Defense Contract Audit Agency, the definition also includes those persons engaged in quality assurance inspections under government contracts who are not

traditionally viewed as auditors.<sup>19</sup> This expansive definition brings a substantial number of federal employees within the scope of section 1516, including quality assurance representatives, Defense Contract Administration Services plant representative office personnel, and contracting officer representatives. This should provide a powerful deterrent against contractor efforts to prevent the government from detecting that the contractor has failed to deliver goods and services in conformance with contract specifications.<sup>20</sup>

### Pendency of Audit Requirement

As a prerequisite to any violation of section 1516, the obstructive endeavor must be committed during the pendency of an audit known to the defendant. This "pendency requirement" derives from the language of section 1516 that an auditor must be obstructed "in the performance of official duties" and is analogous to the pendency requirement the courts have applied to 18 U.S.C. § 1503, 1505, and 1510.<sup>21</sup> An act committed with knowledge that it may or will obstruct an audit that, although likely to occur at a subsequent time, has not yet been initiated in any manner, is insufficient to violate section 1516.<sup>22</sup> The existence of some official act pertaining to the audit known to the defendant must be established at the time of the obstructive endeavor. This act may entail even the most preliminary step, such as an auditor or a representative from the auditor's agency providing oral notification to a contractor that an audit is scheduled or that a meeting to discuss the scheduling of an audit is desired.

<sup>13</sup> See, e.g., *United States v. Silverman*, 745 F.2d 1386 (11th Cir. 1984).

<sup>14</sup> See, e.g., *United States v. Jeter*, 775 F.2d 670 (6th Cir. 1985); *United States v. Dougherty*, 763 F.2d 970 (8th Cir. 1985); *United States v. Murray*, 751 F.2d 1528 (9th Cir. 1985), *cert. denied*, 474 U.S. 979 (1985).

<sup>15</sup> See *United States v. Kahaner*, 317 F.2d 459 (2d Cir. 1962), *cert. denied*, 375 U.S. 836 (1963); see generally 2 Sand, *Modern Federal Jury Instructions* § 46-1 (1987 & Supp. 1988).

<sup>16</sup> See *United States v. Guzzino*, 810 F.2d 687 (7th Cir. 1987); *United States v. Capo*, 791 F.2d 1054 (2d Cir. 1986). While these cases suggest that to be in violation of section 1516, the defendant must have knowledge that an auditor is in the performance of his official duties, neither the statute nor the legislative history appear to require knowledge of the federal nature of the auditor or his duties. The plain language of the statute reflects that the scienter requirement, the intent to deceive or to defraud the United States, is separate and distinct from the requirement that the endeavor to obstruct be directed to a federal auditor. See *United States v. Yermian*, 468 U.S. 63 (1984) (proof of actual knowledge of federal agency jurisdiction is not required under 18 U.S.C. § 1001); *United States v. Feola*, 420 U.S. 671 (1975) (in a prosecution under 18 U.S.C. § 111 for assaulting a federal officer, there is no requirement that the defendant know that the victim was a federal officer); *United States v. Ardito*, 782 F.2d 358 (2d Cir. 1986), *cert. denied*, 476 U.S. 1160 (1986) (under 18 U.S.C. § 1503, there is no requirement of specific intent to interfere with a proceeding known by the defendant to be federal in nature). But see *United States v. Daly*, 842 F.2d 1380, 1391 (2d Cir. 1988) (suggesting in dicta that under 18 U.S.C. § 1510 there is a requirement that the defendant know the federal nature of the criminal investigation).

<sup>17</sup> See *United States v. Jeter*, 775 F.2d 670 (6th Cir. 1985); *United States v. Dougherty*, 763 F.2d 970 (8th Cir. 1985).

<sup>18</sup> 18 U.S.C. § 1516(b).

<sup>19</sup> The Defense Logistics Agency has responsibility for conducting contract quality assurance inspections for contracts with the Department of Defense.

<sup>20</sup> Government contract quality assurance includes the various functions, including inspection, performed by the government to determine whether a contractor has fulfilled the contract obligations pertaining to quality and quantity. Fed. Acquisition Reg. 46.101 (1 Apr. 1984) [hereinafter FAR]. Inspection means examining and testing supplies or services (including, when appropriate, raw materials, components and intermediate assemblies) to determine whether they conform to contract requirements. *Id.* Quality assurance inspection clauses, which afford the government the right to make quality assurance inspections and tests, as appropriate, are required in government contracts. See FAR 56.202-2(a); FAR 46.501(a) (government contract quality assurance shall be performed at such times (including any stage of manufacture or performance of services) and places (including subcontractors' plants) as may be necessary to determine that the supplies or services conform to contract requirements).

<sup>21</sup> See *United States v. Reed*, 773 F.2d 477, 485 (2d Cir. 1985); *United States v. Vesich*, 724 F.2d 451, 454 (5th Cir. 1984). As previously noted, there is no requirement that the defendant have knowledge of the federal nature of the auditor or his duties.

<sup>22</sup> See *United States v. Ellis*, 652 F. Supp. 1451 (S.D. Miss. 1987).

Intentional cost mischarging, noncompliance with cost accounting standards, defective pricing, submission of false claims or certificates, and other improprieties commonly committed by dishonest contractors often involve false statements or writings that, as a collateral matter, ultimately mislead or otherwise deceive an auditor. In most instances, however, these acts will not have been committed at the time that an auditor was in the performance of official duties known to the defendant. As a result, they will not constitute violations of section 1516. Such offenses are better charged, when appropriate, as false claims, false statements, or other applicable offenses.

It may be argued that requiring the pendency of an audit known to the defendant at the time of the obstructive endeavor construes section 1516 too narrowly. By its terms, section 1516 pertains to obstructions that occur in the context of an ongoing contractual relationship between the government and the contractor. By virtue of the required audit and quality assurance inspection clauses in a government contract,<sup>23</sup> a contractor is effectively on notice that he or she will, in all likelihood, be subject to an audit or a quality assurance inspection. Accordingly, one can argue that obstructive acts committed prior to the actual pendency of an audit, but with knowledge that an audit or inspection is reasonably foreseeable, are within the scope of section 1516 because the contractor is on notice under the contract of the obstructive effect that his acts will have on any future audit or inspection. In effect, therefore, one can argue that what matters is not the pendency of an audit, but the pendency of a contract.

This argument imparts to section 1516 an extremely expansive scope that is unsupported by the legislative history. In enacting section 1516, Congress sought to provide the federal auditor with "the same protection for obstruction that the investigator, administrative proceed-

ings, and the grand jury have in sections 1503, 1505, 1510, and 1512 of title 18 of the United States Code."<sup>24</sup> A review of the cases construing sections 1503, 1505, and 1510 suggests that it is well-settled that for an obstructive act to be criminal under those statutes, it must be committed during the pendency of an administrative or judicial proceeding or at the time that an investigator or investigation exists to which information is to be communicated.<sup>25</sup> It is reasonable to read a similar pendency requirement into section 1516.<sup>26</sup> Moreover, had Congress intended to abolish the pendency requirement for section 1516, it would have done so explicitly as it did at 18 U.S.C. § 1512(e)(1).<sup>27</sup>

There is nothing in the legislative history of section 1516 to suggest that Congress intended the scope of that statute to be broader than the analogous obstruction of justice statutes. Yet, taken to its logical conclusion, the argument that section 1516 requires only the pendency of a contractual relationship would provide section 1516 with an extraordinary breadth. Section 1516 could, under such an interpretation, be read to prohibit all knowing and willful cost mischarging, defective pricing, product substitution, and defective testing because all such activity, in one respect or another, involves the falsification of records subject to an audit or to a quality assurance inspection under a contract. The plain language of the statute and the legislative history do not support such a broad application of section 1516.

#### Performance of Official Duties

Neither section 1516 nor the legislative history offers any guidance on the meaning of the phrase "in the performance of official duties." Nevertheless, cases decided under an analogous statute, which makes it a crime to assault a federal officer engaged in the performance of official duty,<sup>28</sup> suggest that the phrase should not be interpreted narrowly.<sup>29</sup>

<sup>23</sup> See, e.g., 10 U.S.C. § 2306a(f) (government granted right to examine contractor records related to the contract proposal; negotiations, pricing, and performance for the purpose of evaluating cost and pricing data submitted by the contractor); 10 U.S.C. 2313 (government authorized to inspect the plant and audit the books and records of a contractor performing a cost or cost-plus-fixed-fee contract); FAR 15.106-2 (audit negotiation requirement); FAR 52.214-26 (audit sealed bidding); FAR 52.215-2 (audit negotiation clause); FAR 52.216-7 (allowable cost and payment audits); FAR 52.230-3 (audit for cost accounting standards compliance); FAR 52.232-16 (audit of progress payments); FAR 56.202-2(a) (quality assurance inspection clause).

<sup>24</sup> 134 Cong. Rec. S17371 (daily ed. Nov. 10, 1988); see *supra* note 5.

<sup>25</sup> E.g., *United States v. Vesich*, 724 F.2d 451, 454 (5th Cir. 1984); *United States v. Siegel*, 717 F.2d 9 (2d Cir. 1983).

<sup>26</sup> *United States v. PATCO*, 653 F.2d 1134 (7th Cir. 1981), *cert. denied*, 454 U.S. 1083 (1981) (in interpreting legislative history of a statute, there is a presumption that Congress was aware of existing law; thus, a newly enacted statute is to be read in conjunction with the entire existing body of law).

<sup>27</sup> *Bush v. Oceans International*, 621 F.2d 207 (5th Cir. 1980) (a change in the status quo should not be inferred unless Congress has unmistakably indicated a wish to the contrary).

<sup>28</sup> 18 U.S.C. § 111 (1988).

<sup>29</sup> See *United States v. Streich*, 759 F.2d 579, 584 (7th Cir. 1985), *cert. denied*, 474 U.S. 860 (1985) (test is whether officer is acting within scope of what he is employed to do or is engaging in a personal frolic of his own); *United States v. Boone*, 738 F.2d 763 (6th Cir. 1984), *cert. denied*, 469 U.S. 1042 (1984) (the parameters of the statutory requirement that a federal officer covered by the Act must be engaged in the performance of his official duties are inherently fluid); *United States v. Stephenson*, 708 F.2d 580 (11th Cir. 1983) (FBI agent acting in her official capacity when she was assaulted on her way to work).



It is reasonable to conclude that where some connection can be shown between the auditor's duties relating to a contractor (traditional audit activity or quality assurance inspection activity) and the endeavor to obstruct, the courts will find that the auditor was "in the performance of official duties" as that phrase is used in section 1516. Moreover, provided that the audit or quality assurance inspection is in some manner pending, there is no requirement that an auditor actually be performing audit or quality assurance inspection duties at the time of the endeavor to obstruct. An auditor's duties clearly encompass activity conducted in preparation for and subsequent to an actual audit or quality assurance inspection.<sup>30</sup>

### Endeavor to Influence, Obstruct, or Impede

Consistent with the obstruction of justice statutes after which section 1516 was patterned,<sup>31</sup> the operative word in section 1516 is "endeavor." As used in section 1516, "endeavor" means any effort or attempt to influence, obstruct, or impede.<sup>32</sup> Section 1516 prohibits any attempt, effort, or endeavor to influence, obstruct, or impede an audit, including situations where a defendant could have reasonably foreseen that the natural and probable consequences of the endeavor would be to influence, obstruct, or impede an audit.<sup>33</sup> Typical endeavors within the scope of section 1516 might include concealing or destroying records, fabricating or altering records, lying to an auditor, threatening an auditor, offering a bribe or gratuity to an auditor, encouraging another not to cooperate with an audit, or causing a third person to do any of the foregoing.<sup>34</sup>

### Specific Intent

To violate section 1516, an individual must act with knowledge and intent.<sup>35</sup> That is, the endeavor to

influence, obstruct, or impede an audit must be done voluntarily and intentionally, and not because of mistake, accident, ignorance, or other innocent reason.<sup>36</sup> Moreover, the endeavor must be a willful act of the defendant. Under section 1516, the willful act to obstruct an audit is one done voluntarily and intentionally, with the specific intent to deceive or to defraud the United States.<sup>37</sup> In this regard, the defendant must purposely intend that the obstructive endeavor will deceive or defraud the United States.<sup>38</sup>

Intent to deceive and intent to defraud are not synonymous. Intent to deceive involves a willful act to induce a false belief or to mislead.<sup>39</sup> Intent to defraud requires that one act willfully to deceive or cheat for the purpose of causing financial loss to another or bringing about financial gain to one's self.<sup>40</sup> In either case, however, section 1516 requires that the endeavor to influence, obstruct, or impede an audit be done with the specific intent to deceive or to defraud the United States.

In the typical obstruction of audit prosecution, it is likely that the endeavor to influence, obstruct, or impede an audit will clearly involve an attempt to mislead the auditor in some fashion so that an intent to deceive the United States can easily be proven. It is equally likely that the attempt to mislead the auditor will be for the pecuniary gain of the contractor (e.g., to avoid the detection and disallowance of costs improperly charged by the contractor) such that an intent to defraud the United States will be evident. If this is so, the courts may find no analytical difference between an intent to defraud and an intent to deceive for the purpose of section 1516.<sup>41</sup> Practitioners should nonetheless be aware that if an intent to defraud is alleged, one must prove not only deceit, but also the additional element that such deceit was for the purpose of causing financial loss to another or financial gain to the defendant.

<sup>30</sup> See *United States v. Fernandez*, 837 F.2d 1031 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 102 (1988) (In a prosecution under 18 U.S.C. § 1503, evidence was sufficient to establish that an assistant United States attorney was engaged in the "discharge of his duty" when the defendant threatened him on the street immediately after the defendant's brother had been sentenced. The Assistant U.S. Attorney's involvement in the case did not end at sentencing because there remained the possibility of an appeal or of post-sentencing motions.)

<sup>31</sup> 18 U.S.C. ch. 73 (1988).

<sup>32</sup> See *United States v. Osborn*, 385 U.S. 323, 333 (1966); *United States v. Silverman*, 745 F.2d 1386 (11th Cir. 1984).

<sup>33</sup> See *United States v. Fields*, 838 F.2d 1571 (11th Cir. 1988); *United States v. Silverman*, 745 F.2d 1386 (11th Cir. 1984).

<sup>34</sup> See *supra* notes 7-13.

<sup>35</sup> See *United States v. Jeter*, 775 F.2d 670, 679 (6th Cir. 1985) (interpreting the requirement under 18 U.S.C. § 1503 that an endeavor to interfere with the due administration of justice must be done "corruptly").

<sup>36</sup> See *United States v. Touloumis*, 771 F.2d 235, 243 (7th Cir. 1985).

<sup>37</sup> See *Jeter*, 775 F.2d 670.

<sup>38</sup> While proving the requisite intent to deceive or to defraud may necessarily involve showing that the defendant had actual knowledge of the federal nature of both the auditor and official duties, the language of section 1516 does not make the defendant's actual knowledge of the federal nature of the auditor and the official duties a separate element of intent. See *supra* note 16.

<sup>39</sup> *United States v. Lichenstein*, 610 F.2d 1272, 1276-77 (5th Cir. 1980), *cert. denied*, 447 U.S. 907 (1980).

<sup>40</sup> *United States v. McGuire*, 744 F.2d 1197, 1200 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985).

<sup>41</sup> In approving a trial court's jury instruction for 18 U.S.C. § 1005 that failed to distinguish between an intent to defraud and an intent to deceive a bank officer, the Sixth Circuit failed to perceive intent to deceive and defraud as distinct theories of liability. *United States v. McGuire*, 744 F.2d 1197 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985).

Both the language of section 1516 and the legislative history are silent on the question of whether, for a defendant charged with intent to deceive, the falsity at issue must be to a material fact. Without a materiality requirement, a defendant who willfully provides inconsequential but misleading information to an auditor could be culpable under section 1516. The courts may read a materiality requirement into section 1516 when an intent to deceive is charged to ensure the reasonable application of the statute and to exclude trivial falsehoods from the scope of section 1516.<sup>42</sup> In the context of an audit, any falsity having a natural tendency to influence or the capability of influencing an auditor's actions or decisions would be material.<sup>43</sup>

As a practical matter, imposition of a materiality requirement would not be unduly restrictive. If a falsity is not material, it is unlikely that sufficient evidence would exist to prove the existence of an endeavor to obstruct an audit with intent to deceive in the first instance.

### Threshold Contractual Relationship

To trigger the prohibitions of section 1516, the audit activity to which the endeavor to influence, obstruct, or impede is directed must relate to a person or organization receiving more than \$100,000 from the United States under a contract or subcontract in any one-year period. This jurisdictional language focuses not on the nature or the size of the contract or subcontract to which the audit actually pertains, but is applied to the person or organization being audited.

If that person or organization receives more than \$100,000 from the United States under one or more contracts or subcontracts in any one-year period, section 1516 can fairly be read to apply regardless of the value of the contract to which the audit at issue pertains. The language of the statute does not appear to require that each contract or subcontract individually exceed the \$100,000 threshold. If a person or organization receives an aggregate in excess of \$100,000 under one or more contracts or subcontracts, each of which has a value of \$100,000 or less, from the United States in any one-year period, the jurisdictional language of section 1516 is satisfied.

Section 1516 applies only to a person or organization "receiving" the \$100,000 threshold amount. A literal interpretation of the word "receiving" suggests that the person or organization must have actually been paid or otherwise have been credited with payment by the United States before that amount will apply to the \$100,000 requirement. However, such a narrow interpretation would defeat the purpose of section 1516 by excluding many audit functions from its scope. For example, pre-award surveys, audits of cost and pricing data submitted with a proposal, and quality assurance inspections of first items often will be conducted prior to any payment by the United States to the contractor. Requiring actual payment by the United States before section 1516 can be applied would thus allow contractors to avoid the early detection of fraud.<sup>44</sup> Accordingly, a more reasonable interpretation, consistent with the legislative purpose of section 1516, is that "receiving in excess of \$100,000" applies to amounts paid as well as to amounts due or owing under one or more contracts or subcontracts in any one-year period.

The phrase "in any 1 year period" in section 1516 is not further defined by the statute or explained by the legislative history. However, a recently proposed amendment defining analogous language found in 18 U.S.C. § 666(d), suggests the "one-year period" may be limited to any continuous one-year period commencing no more than one year before or ending no more than one year after the commission of the obstruction of audit offense.<sup>45</sup>

### Audit Rights and Rights of Access

Section 1516 does not create for government auditors new or expanded audit rights or rights of access to contractor records that otherwise would be beyond the scope of a government contract audit. The extent of the government's access to contractor records in an audit remains circumscribed by the statutory and contractual provisions that authorize access and by judicial and administrative interpretations of those provisions.<sup>46</sup> Section 1516 is not a sword with which auditors may threaten contractors in an effort to secure unauthorized access to records.

<sup>42</sup>See *United States v. Chandler*, 752 F.2d 1148, 1150-51 (6th Cir. 1985).

<sup>43</sup>*Id.*

<sup>44</sup>See *supra* text accompanying notes 5-7.

<sup>45</sup>135 Cong. Rec. S13433 (daily ed. Oct. 16, 1989) (proposed amendment to section 1414 of the Rural Drug Enforcement Act). Section 1414 defines "in any one year period" as "a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense."

<sup>46</sup>See *supra* note 23; see also *United States v. Newport News Shipbuilding Corporation*, 837 F.2d 162 (4th Cir. 1988) (statutory subpoena power of DCAA extends to cost information related to a government contract. DCAA does not have unlimited power to demand access to all internal corporate materials of companies performing cost-type contracts for the government.)

A contractor may have legitimate, good-faith reasons for refusing to disclose certain records or documents, or for requiring an auditor to meet procedural or other requirements prior to having access to contractor records or employees. Accordingly, not every instance where a contractor denies an auditor access to records or to employees will constitute a violation of section 1516. Auditors should use established administrative procedures to obtain the access sought and to delineate more clearly the facts surrounding the denial of that access.<sup>47</sup> Referral of cases for suspected violations of section 1516 should be made where it is readily apparent that a contractor or other individual is endeavoring—with the intent to deceive or to defraud the United States—to influence, obstruct, or impede the audit.

### Illustrative Factual Scenarios

The following are some factual scenarios designed to illustrate the scope of section 1516:

#### Example 1

The manager of a contractor's marketing department systematically changes employee timesheets to reflect as allowable marketing costs a significant amount of time actually spent on unallowable marketing costs such as advertising, lobbying, and public relations. As a result, during a subsequent audit by DCAA the auditor was unable to detect the cost mischarging.

The acts of the manager are not, under these facts, a violation of section 1516. At the time that the manager changed the timesheets, an audit was not pending—a federal auditor was not in the performance of official duties. To violate section 1516, the endeavor to influence, impede, or obstruct must be committed when an audit is pending or when an auditor is otherwise in the performance of official duties known to the defendant.

#### Example 2

Although the manager in Example 1 changed the timesheets, he did not change a weekly activity report that accurately reflected labor costs. Upon learning that DCAA was about to initiate an audit of labor costs in his department, the manager collected all the weekly activity reports and destroyed them. When questioned by the auditor concerning the existence of those reports, the manager denied that they ever existed.

Both the destruction of records that the manager knew were being sought (or could reasonably have anticipated would be sought) and the false statement to the auditor about the existence of the records clearly constitute endeavors to influence, obstruct, or impede the auditor in

the performance of official duties with the intent to deceive and to defraud. Such conduct, therefore, constitutes a violation of section 1516. The same conclusion would obtain had the manager fabricated a weekly activity report corroborating the false timecards and presented or made available that fabricated report to the auditor.

#### Example 3

An auditor was evaluating a price proposal submitted by a contractor and while examining the contractor's overhead rate found that the contractor had monthly rental costs approximately one-half of those submitted with the proposal. When questioned about this, the contractor submitted rental receipts in support of his proposal. The auditor knew these receipts were false. The auditor was not influenced or impeded in any way by the false rental receipts.

The submission of false records to the auditor by the contractor with the intent to deceive is a violation of section 1516. The intent at issue in the context of section 1516 is that of the individual endeavoring to obstruct the auditor. It is not material whether the endeavor was successful or whether the auditor was in fact influenced, obstructed, or impeded.

#### Example 4

Assume that in Example 3, upon being questioned about the rental costs by the auditor, the contractor's treasurer became verbally belligerent and abusive towards the auditor. While standing extremely close to the seated auditor, he began screaming that the auditor was stupid, incompetent, and did not know what he was talking about.

While this conduct is rude, in bad taste, and is undoubtedly an endeavor to influence, obstruct, or impede the auditor, it is probably not a violation of section 1516. Generally rude behavior to an auditor does not rise to the level of a criminal offense under section 1516.

#### Example 5

Assume that in Example 4, the treasurer suggested to the auditor that it would be better for the auditor's health if he stopped making any further inquiries or reports about the rental costs because unfortunate accidents were known to happen to overly diligent or inquisitive auditors.

Assuming that the circumstances of such a statement indicated that it was made seriously, any such direct or implied threat of physical harm to an auditor or a third

<sup>47</sup>See, e.g., DCAA Contract Audit Manual, para. 1-504.4 (July 1989).

person associated with the auditor would constitute a violation of section 1516.

#### *Example 6*

During a routine floor check, an employee refuses to speak with an auditor and will not provide the auditor or the employer any reason for that refusal to speak with the auditor.

Generally, the refusal of a contractor employee to speak with an auditor, without more, will not constitute obstruction of an audit. While the duty of the employee to speak with the auditor can be debated,<sup>48</sup> proving criminal intent in such an instance would be problematic.

#### *Example 7*

After hearing that an auditor may be interviewing some of his employees in connection with the audit of an equitable adjustment claim, a manager instructs his employees that they are not permitted to speak with the auditor or give the auditor any records that he may request.

At first glance, such a scenario would appear to be a violation of section 1516 in that the manager is seeking to have third parties obstruct the audit. Nevertheless, one must determine the reasons for the manager's instructions. For example, there would be no violation if the manager entertained a good faith belief that he had the authority to direct such noncooperation or the mistaken belief that he was implementing company policy. It is more likely, however, that the contractor would make it exceedingly difficult for an auditor to obtain interviews or records by requiring unreasonable and dilatory procedural steps, such as requiring that requests be made in writing three weeks in advance or requiring that all contacts be made through one person who is never available. Although placing such roadblocks in the way of an audit may fall within the scope of section 1516, in the absence of direct evidence that the defendant used the procedural devices to obstruct an audit, it would be difficult to prove a criminal obstruction case where the requisite criminal intent must be inferred from the access requirements established by a contractor. The preferable remedy in such cases is to pursue the appropriate administrative sanctions such as disallowance of costs or suspension of contract payments.

#### *Example 8*

During an audit of a contractor's cost proposal, a contractor refuses to disclose an internal estimate of cost

used to prepare the contractor's final certificate of cost and pricing data. The contractor tells the auditor that based on the advice of his attorneys, he believes that such an estimate is not within the disclosure requirements of the Truth in Negotiations Act. The auditor responds by threatening the contractor with a fraud referral for a violation of section 1516.

Where a contractor refuses an auditor access to records in apparent good faith, it is not appropriate to use the threat of section 1516 as a means by which to expand the auditor's access. In such instances, auditors should refer to internal administrative procedures to deal with such a denial of access.

#### *Example 9*

Knowing that a quality assurance representative from a Defense Contract Administrative Services Management area office is coming to a contractor's facility to inspect a recently manufactured lot of electronic circuit boards, a production control manager physically switches the lot to be inspected with a lot already having passed inspection. Having fallen behind in its production schedule, the contractor manufactured the latest lot without subjecting it to time-consuming quality control tests, and the manager believes that thirty to forty percent of the lot would fail inspection.

The manager's actions constitute an endeavor to obstruct the quality assurance inspection and are done with an obvious intent to deceive the quality assurance representative. Such conduct clearly violates section 1516.

#### *Conclusion*

Section 1516 provides the government with an effective means with which to counter the obstruction of audits and quality assurance inspections. Section 1516 prohibits obstructive endeavors such as the destruction, alteration, fabrication, or concealment of documents or other information. Additionally, it prohibits the intimidation of witnesses and contractor employees during the pendency of an audit or quality assurance inspection. While section 1516 does not create new or expanded audit rights or rights of access to contractor records, it protects the federal auditor from those obstructive endeavors that often prevent the auditor from exposing fraudulent activity. Procurement fraud advisors and other practitioners should be alert to the potential application of section 1516 to instances of alleged contract fraud.

<sup>48</sup> See Covington & Gruss, *Corporate Employee's Entitlement to Use Immunity*, 47 Fed. Contracts Rep. 743 (April 27, 1987). The authors criticize the position of DCAA, expressed in a March 10, 1986 memorandum, that pursuant to the audit-negotiation clause of the Federal Acquisition Regulation (FAR 52.215-2) and other authority, an individual employee has no personal right to decide whether to talk with a DCAA auditor and that the contractor is obliged to instruct the employee to make himself available.

# USALSA Report

United States Army Legal Services Agency

## The Advocate for Military Defense Counsel

### DAD Notes

#### "A Mistake of Wife Defense?"

The Army Court of Military Review recently had occasion to consider an accused's somewhat unique "mistake of wife" defense. The accused's scenario starts after a long day at the office. He goes home, drinks some beer, retires to his bedroom, and falls asleep while his wife is still at work. Later, while in a semiconscious state, his wife enters the bed and he becomes sexually aroused. As he usually does under such circumstances, he begins having sexual intercourse with her. Then, to his horror, he hears a voice say "Dad" after he ejaculates. The woman he thought to be his wife turns out to be his 15-year-old niece. In *United States v. Adams*<sup>1</sup> the Army Court of Military Review recently held that this scenario, even if taken as the truth, would offer no defense to a charge of carnal knowledge.

In *Adams* the accused pleaded guilty to carnal knowledge<sup>2</sup> for committing an act of sexual intercourse with his 15-year-old niece. During the providence inquiry, the accused recited the information above to explain the circumstances of his plea of guilty. On appeal, the accused contended that his guilty plea was improvident because the military judge failed to discuss adequately and resolve the accused's mistake of fact concerning the identity of the victim. The Army court, however, held that the accused's plea was provident. The court pointed out that ignorance of the true age of the female is no defense to a charge of carnal knowledge.<sup>3</sup> It then opined

that "the statutory preclusion of mistake as to age of necessity includes identity."<sup>4</sup> The court thereby extended a strict liability standard (i.e., "the burden of being right") to the soldier's marital bed offering two social policy reasons:

First, the soldier can be sure he is right as to age and identity—elemental care regarding such intimacy would preclude the effectiveness of deceit ... therefore, he can fairly be held to refrain from sexual relations unless he knows he is right. Second, in this special area of danger to a strong interest of society, pregnancy by unwed females younger than sixteen, Congress may impose the duty to be right; the duty of care to society is great.<sup>5</sup>

The general rule of criminal law is that guilt attaches only to cases in which the accused intended to do a prohibited act.<sup>6</sup> A recognized exception to that general rule has been the law regarding statutory rape, in which reasonable mistake of age is no defense.<sup>7</sup> In *Adams* the Army court carved out a new exception and added a new burden to a male soldier who may otherwise be faithful and monogamous in his marriage. A court now can find that a married soldier, under an honest and reasonable belief that he had made love to his wife under the sheets of his marital bed, is criminally liable if an underage girl manages to deceive him. This undoubtedly would be a rare occurrence.<sup>8</sup> However, application of the *Adams*

<sup>1</sup>30 M.J. 1035 (A.C.M.R. 1990).

<sup>2</sup>Uniform Code of Military Justice art. 120(b), 10 U.S.C. § 920 (1982) [hereinafter UCMJ]:

Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a female, not his wife who has not attained the age of sixteen years, is guilty of carnal knowledge and shall be punished as a court-martial may direct.

<sup>3</sup>*Adams*, 30 M.J. at 1036 (citing Manual for Courts-Martial, United States, 1984, Part IV, para. 45c(2)).

<sup>4</sup>*Id.* at 1037.

<sup>5</sup>*Id.*

<sup>6</sup>*See Morissette v. United States*, 342 U.S. 246, 251 (1952); 21 Am. Jur. 2d, *Crim. Law* § 81, 82.

<sup>7</sup>Although reasonable mistake of age normally is not a defense to statutory rape, the modern trend for jurisdictions has been to make reasonable mistake as to age an affirmative defense. *See, e.g.*, Sexual Abuse Act of 1986, 18 U.S.C. § 2243(c)(1)(1988); Wash. Rev. Code § 9A.44.030(2)(1979) (based on declaration of alleged victim); Ky. Rev. Stat. Ann. § 500.070, 510.030(1974); Mo. Rev. Stat. § 566.020(3)(1979) (if child is 14 or 15 years old).

<sup>8</sup>An underage girl deceiving a married adult male into having sexual intercourse with her is not necessarily implausible. The victim in *Adams*, while not implying that she tried to deceive the accused, nevertheless admitted in a sworn statement that she got into his bed wanting to have sexual intercourse with the accused. Indeed, in one recorded case, the converse of the factual scenario in *Adams* occurred, i.e., a sleeping woman was awakened believing at first to be copulating with her husband only to discover after hearing him speak that it was another man. *Reg. v. Young*, 14 Cox Crim. Cas. 114 (1878). In other cases, males have managed to enter the domicile and bed of women and engage in sexual intercourse with them before they awoke. Of course, in those cases (unlike *Adams*), the person sneaking in the bed was the rapist and the person entitled to be there was the victim. *See, e.g.*, *State v. Moorman*, 320 N.C. 387, 358 S.E.2d 502 (1987) (victim fell asleep in her dorm room and dreamed she was engaging in sexual intercourse only to wake up and find the accused, who had broken into her room, on top of her already engaged in vaginal intercourse); *State v. Stroud*, 362 Mo. 124, 240 S.W.2d 111 (1951) (victim fell asleep in her bed at home only to be awakened an hour later by a man she had known only casually, who had already begun the act of sexual intercourse with her). *See generally* Note, *State v. Moorman: Can Sex With a Sleeping Woman Constitute Forcible Rape?*, 65 N.C.L. Rev. 1246 (1987).

rational to an appropriate case in the future might raise a due process issue of constitutional dimensions.

A male soldier who has sexual intercourse with a female of questionable age who is not his wife presumably understands the criminal risks he takes with respect to her actual age. On the other hand, a married soldier who reasonably assumes that he is having sexual relations with his wife could not possibly know of the risks he would be taking with respect to an imposter's age. The "duty to be right" in a case of a married man's mistaken identity in his own bedroom may in fact be a greater denial of due process than in the case of mistake as to age, and such a duty also may impinge on constitutionally protected rights of privacy. Now, an error in one's own marital bed could risk criminal prosecution. This new "duty" of married men who lack criminal intent may be difficult to reconcile with the policy reasons used to justify strict liability with respect to mistake as to age.<sup>9</sup>

Counsel defending a charge of carnal knowledge presently have little, if anything, to offer in defense if the accused admits the act of sexual intercourse and the female is under the age of consent. The *Adams* case has made the charge a more difficult one against which to defend. However, should the issue of mistaken identity arise, an attack on constitutional grounds may offer a unique method to attempt to raise the defense and to preserve the issue for appeal. CPT Alan M. Boyd.

#### **Don't Put Off 'til Tomorrow What You Can Do Today: Deferment of Confinement and *Moore v. Akins***

The Court of Military Appeals recently decided the case of *Moore v. Akins*.<sup>10</sup> At issue in *Moore* was whether the convening authority abused his discretion by denying Gunnery Sergeant Moore's request that the convening authority defer service of his adjudged confinement pending completion of appellate review of his case. The *Moore* case was before the Court of Military Appeals on a petition for extraordinary relief after the Navy-Marine Corps Court of Military Review set aside Moore's conviction.<sup>11</sup> In its decision, the Court of Military Appeals

set out a thorough analysis of article 57(d)<sup>12</sup> that is very helpful to defense counsel seeking deferment of confinement for a client.

A court-martial convicted Gunnery Sergeant Moore of raping his stepdaughter, but the Navy-Marine Court of Military Review set aside the conviction and dismissed the charges. The Judge Advocate General of the Navy certified the case to the Court of Military Appeals. Sergeant Moore then asked the convening authority to release him from confinement pending completion of that appellate review. When the convening authority denied his request, Sergeant Moore sought deferment of his confinement. The convening authority denied that request as well. He then filed a petition for extraordinary relief with the Court of Military Appeals seeking the deferment. The Court of Military Appeals granted the writ.

In reaching its decision, the court reviewed the congressional intent of Uniform Code of Military Justice article 57(d). The court concluded that Congress added subsection (d) to article 57 to keep the military criminal justice system in line with federal and state civilian courts, which allow the release on bail of a defendant pending appeal.<sup>13</sup> Article 57(d) gives the convening authority very broad discretion on whether to defer an individual's service of confinement.<sup>14</sup> However, the convening authority's decision is subject to review by the appellate courts for abuse of discretion.<sup>15</sup> Factors that the convening authority should consider in determining whether to grant the deferment include:

the probability of the accused's flight; the probability of the accused's commission of other offenses, intimidation of witnesses, or interference with the administration of justice; the nature of the offenses (including the effect on the victim) of which the accused was convicted; the sentence adjudged; the command's immediate need for the accused; the effect of deferment on good order and discipline in the command; and the accused's character, mental condition, family situation, and service record.<sup>16</sup>

<sup>9</sup> Another way to pose the question concerning a married man's duty to avoid sex with a girl not his wife under the age of sixteen is as follows: Does the interest of society in protecting against pregnancy by unwed females younger than sixteen outweighs the due process and privacy rights of a married soldier who now is encumbered with a duty to inspect his wife before engaging in sexual intercourse in the darkness of his own bedroom?

<sup>10</sup> 30 M.J. 249 (C.M.A. 1990).

<sup>11</sup> 30 M.J. 962 (N.M.C.M.R. 1990).

<sup>12</sup> UCMJ art. 57(d).

<sup>13</sup> *Moore*, 30 M.J. at 251.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 252; see also *United States v. Brownd*, 6 M.J. 338 (C.M.A. 1979); *Pearson v. Cox*, 10 M.J. 317 (C.M.A. 1981).

<sup>16</sup> Manual for Courts-Martial, 1984, Rule for Courts-Martial 1101(c)(3) [hereinafter R.C.M.].

Some of these factors are the same for determining whether pretrial confinement is appropriate.<sup>17</sup> In fact, the Court of Military Appeals specifically said in *Moore* that "[i]f the situation is one in which the Government could establish a basis for pretrial confinement ... then it should have the opportunity to show why the accused should be kept in confinement pending the conclusion of appellate review."<sup>18</sup> The court suggested that a military judge could determine this issue at a special hearing.

In *Moore* the court found no reason not to defer service of confinement. Gunnery Sergeant Moore had been in the Marine Corps for more than seventeen years. He was under investigation pending possible trial for eighteen months, yet his commander never placed him in pretrial confinement. The court also noted during the entire period of time, the command never had any concern that Sergeant Moore might flee or seek to threaten any witnesses.<sup>19</sup>

*Moore v. Akins* is a fact-specific decision, and the Court of Military Appeals limits its holdings to "meritorious cases."<sup>20</sup> Nevertheless, if you have a client in a qualifying situation because he is not a flight risk, is not likely to commit other offenses, was never in pretrial confinement, and has potentially successful legal issues on appeal, you also should seek deferment of confinement pending appellate review. Do this before the convening authority orders execution of the sentence. Seeking deferment is especially appropriate if you feel that legal errors exist in your client's case that may warrant relief as to confinement for your client on appeal. If the convening authority denies your request, and the convening authority orders the execution of the sentence to confinement, you should consider filing a petition for extraordinary relief with the Army Court of Military

Review or the Court of Military Appeals.<sup>21</sup> CPT Gregory A. Gross.

### *Batson* in the Military After *Cooper*: A Struggle for the Defense

The Court of Military Appeals recently decided the case of *United States v. Cooper*.<sup>22</sup> The *Cooper* court focused on the issue of whether the trial counsel had articulated a sufficiently race-neutral explanation for his use of a peremptory challenge against a panel member of the appellant's race to sustain that challenge. By discussing the issue and holding that the explanation in question was sufficient, the court has made it easier for defense counsel in military practice to know what is needed to win *Batson*-based objections.

The decision in *Batson v. Kentucky*<sup>23</sup> has spawned a great deal of appellate court activity<sup>24</sup> and legal commentary.<sup>25</sup> This note is limited in scope to examining the *Cooper* decision and suggesting ways trial defense counsel might challenge successfully a trial counsel's proffered "race-neutral" explanation of a peremptory challenge.

The Court of Military Appeals had decided two cases with *Batson* issues prior to *Cooper*. In *United States v. Santiago-Davila*<sup>26</sup> the court held that the government's use of its single peremptory challenge to strike the only panel member of the accused's race raised a *prima facie* showing of discrimination. In *United States v. Moore*<sup>27</sup> the court held prospectively that "every peremptory challenge by the Government of a member of the accused's race, upon objection, must be explained by trial counsel." The court noted in *Cooper* that the decisions in *Santiago-Davila* and *Moore* "admittedly constitute extensions of *Batson*."<sup>28</sup>

<sup>17</sup> See R.C.M. 305(h)(2)(B).

<sup>18</sup> *Moore*, 30 M.J. at 253.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (stating, "clearly, the legislative intent was that a practical means be made available to release accused servicemembers from confinement pending appeal in meritorious cases.").

<sup>21</sup> See DAD Note, *Extraordinary Writs*, The Army Lawyer, June 1989, at 23; DAD Note, *Extraordinary Writs: Creating a Record*, The Army Lawyer, July 1989, at 24; DAD Note, *Extraordinary Writs: Is it a "Writable" Issue?*, The Army Lawyer, July 1989, at 23; DAD Note, *Extraordinary Writs: Filing the Petition for a Writ*, The Army Lawyer, Aug. 1989, at 15.

<sup>22</sup> 30 M.J. 201 (C.M.A. 1990).

<sup>23</sup> 476 U.S. 79 (1986).

<sup>24</sup> As of 2 July 1990, over 460 federal cases cited to *Batson* and at least that many state cases have cited it. As this note will detail, the military appellate courts have also given the subject much attention recently.

<sup>25</sup> See, e.g., Arn, *Batson: Beginning of the End of the Peremptory Challenge*, The Army Lawyer, May 1990, at 33; Defense Guide to *Batson*, The Army Lawyer, Nov. 1989, at 20; Lyu, *Getting at the Truth: Adversarial Hearings in Batson-Inquiries*, 57 Fordham L. Rev. 725 (1989); Note, *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 Harv. L. Rev. 1013 (1989); Comment, *Batson v. Kentucky: Equal Protection, the Fair Cross-section Requirement, and the Discriminatory Use of Peremptory Challenges*, 37 Emory L. J. 755 (1988).

<sup>26</sup> 26 M.J. 380 (C.M.A. 1988).

<sup>27</sup> 28 M.J. 366, 368 (C.M.A. 1989).

<sup>28</sup> *Cooper*, 30 M.J. at 203.



In *Moore* the court returned the case for a *DuBay* hearing<sup>29</sup> to determine whether the trial counsel's explanation met the requirements of *Batson*. The trial counsel had provided an affidavit explaining his reasons for the peremptory challenge in response to a court order from the Army Court of Military Review. However, the Court of Military Appeals concluded that the affidavit did "not sufficiently complete the record to determine if trial counsel's explanation meets the standard of *Batson*."<sup>30</sup> The explanation proffered by the trial counsel in *Moore*, which the Court of Military Appeals found "not sufficiently complete," is instructive. The trial counsel noted that he had dealt with the panel member in question on a previous occasion when the member had been assigned as an article 32(b) investigating officer;<sup>31</sup> that the challenged member responded "with quizzical looks" to several of the standard questions of the military judge during *voir dire*; that the *Moore* trial would have some complicated issues in it; and that the government desired a panel which was least likely to be "confused by the complexities of trial."<sup>32</sup> The court said that "[W]hile we do not find 'indices of racial motivation,' neither do we find an 'explanation.' Therefore the affidavit is insufficient."<sup>33</sup>

Against this backdrop, the Court of Military Appeals decided *Cooper*. Counsel should note that Judge Cox was the author of both *Moore* and *Cooper*.

Specialist Cooper was a black service member. The convening authority appointed ten members to sit on his general court-martial. In response to Cooper's request for enlisted members, four of the panel members selected were senior noncommissioned officers. Two of the ten members were black: Captain Brown, the female panel member who became the subject of the *Batson* dispute, and Command Sergeant Major Williams. The *voir dire* examination of Captain Brown "was entirely innocuous,"<sup>34</sup> but the trial counsel then exercised his peremptory challenge against her. Trial defense counsel objected on the proper basis that the granting of the challenge would deny Specialist Cooper's constitutional right to equal protection. The military judge advised the trial defense counsel that the prosecutor was not required to state any reasons for the challenge (Cooper's court-martial occurred after *Batson* but before any military court had applied it to the military), but nevertheless

made the prosecutor state whether his challenge was racially motivated. The prosecutor answered:

[I] would specifically note that Command Sergeant Major Williams is black so we have not denied the accused of having [sic] a panel of different races and creeds and the prosecution has taken into consideration what it knows about CPT Brown's prior duty experience, current duty position, has had an opportunity to review her [Officer Record Brief] and her forms 2 and 2-1 and, taking all those things into consideration, we exercise our right to peremptorily challenge somebody that ... to bring the court down to a certain number we want or for whatever reason.<sup>35</sup>

The military judge was not satisfied and asked the trial counsel to state for the record that he was not challenging Captain Brown *because* she was black or female. The trial counsel did so. Finally, the military judge asked whether the fact that Captain Brown was black and female entered into his *consideration*. The trial counsel responded that the fact that she was black did not; but as to the fact that she was female, trial counsel responded:

Marginal—just considering what outlook she might present to this case, what her experiences might be as they relate to the evidence the government knows will be put forth here, that I reiterate, the fact she is a woman is just marginally ... what we're really relying on is what all know about her current duty position [company commander], past experience in the Army, i.e. [sic], her worldly experience.<sup>36</sup>

Defense counsel (who the court noted "had not reviewed Captain Brown's records"<sup>37</sup>) asked the court to require that the prosecutor state with particularity what the prosecutor had observed in her records as well as any problems observed in her past duty performance that may have constituted a basis for his challenge. The military judge rejected this request and upheld the challenge.<sup>38</sup>

The Court of Military Appeals noted in passing that a "mere denial" of a racial motive on the part of the prosecutor will not be sufficient,<sup>39</sup> and then went on to adopt the Court of Military Review's "deduction" that "[t]he

<sup>29</sup> See *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

<sup>30</sup> *Moore*, 28 M.J. at 368.

<sup>31</sup> UCMJ art. 32.

<sup>32</sup> *Moore*, 28 M.J. at 368 n.6.

<sup>33</sup> *Id.*

<sup>34</sup> *Cooper*, 30 M.J. at 202 (quoting *United States v. Cooper*, 28 M.J. 811 (A.C.M.R. 1989)).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 203 (quoting *United States v. Cooper*, 28 M.J. 811 (A.C.M.R. 1989)) (emphasis by Court of Military Appeals).

<sup>37</sup> *Id.* at 203.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*



obvious inference ... [is] that the prosecution was probably concerned about certain actions taken by CPT Brown during her tenure as a company commander." The court then noted,

there was no evidence of a pattern of racial discrimination by this prosecutor; the challenge did not deprive the court-martial of all members of appellant's minority; and most importantly, the military judge made a proper and timely inquiry and satisfied himself that the basis of the challenge was not racial.<sup>40</sup>

The Court of Military Appeals upheld the peremptory challenge despite finding that the trial counsel's statements "were no model of clarity."<sup>41</sup> The court said that "[a]lthough in future cases, given the guidance of our later opinions, we might expect even more specificity of explanation by trial counsel, we agree with the Court of Military Review's 'race neutral' construction of trial counsel's motive."<sup>42</sup>

Counsel can learn several lessons from *Cooper*. First, the trial defense counsel in *Cooper* did a very good job of developing a record and preserving the *Batson* issue for appeal. Defense counsel must do this in every case in which a *Batson* problem may occur. The only thing the defense counsel did not do was to review the panel members' records (at least according to the court). That is the second lesson counsel can learn from *Cooper*. Apparently, the military appellate courts are willing to sanction, and indeed infer, a nondiscriminatory basis for a peremptory challenge from a prosecutor's recitation that he is "familiar with a panel member's prior duty experience and current duty position, and a review of the member's personnel records." Defense counsel must be on their toes and aggressive to prevent an alleged prosecutorial review of records and personal history from becoming the pro forma method of overcoming a *Batson* objection. Just as "mere denial" of a racial motive is not sufficient, defense counsel must be on guard to prevent "mere recital" of a review of records from becoming a sufficient basis for a peremptory challenge.

Defense counsel should review the personnel records of prospective court members so that they can counter assertions by trial counsel that no problems exist with particular jurors and, thereby, perhaps force trial counsel to make objections more specific. The language in *Cooper* quoted above dealing with "more specificity" in the future should help in this endeavor.

Defense counsel also must get acquainted with the reputations of prospective court members so that trial counsel are not the only ones that have extrajudicial contact or experience with prospective members. As the Army Court of Military Review said in *United States v. St. Fort*,<sup>43</sup> "[w]hile questions during voir dire may prompt a peremptory challenge, there is no requirement that a prosecutor's reason be supported by the record of voir dire." Defense counsel must be ready to meet this extrajudicial aspect of this subject. Finally, defense counsel should make use of *Batson*'s requirement that the racially-neutral explanation must be "related to the particular case to be tried."<sup>44</sup> *Batson* issues are particularly fact-specific, and defense counsel must force trial counsel to show facts on the record that justify the conclusion that the challenge is not racially motivated. Captain Michael J. Berrigan.

#### Limits to Rebuttal of Unsworn Statements

Unsworn statements are an effective means that defense counsel have to control the flow of information to the factfinder on sentencing. The Court of Military Appeals recently decided two cases that limit the extent to which trial counsel can rebut facts about which an accused testifies in an unsworn statement.

Rule for Courts-Martial 1001(c)(2)<sup>45</sup> allows an accused to present evidence through an unsworn statement. The rule proscribes cross-examination on the statement, but permits rebuttal of "any statements of facts therein."

In *United States v. Cleveland*<sup>46</sup> the accused made an unsworn statement in which he expressed his feelings that he had served well in the United States Air Force.<sup>47</sup>

<sup>40</sup>*Id.* (quoting *United States v. Cooper*, 28 M.J. 811 (A.C.M.R. 1989)).

<sup>41</sup>*Id.* at 202.

<sup>42</sup>*Id.* at 204.

<sup>43</sup>26 M.J. 764, 766 (A.C.M.R. 1988).

<sup>44</sup>476 U.S. at 98.

<sup>45</sup>MCM, 1984.

<sup>46</sup>29 M.J. 361 (C.M.A. 1990).

<sup>47</sup>*Id.* Cleveland pleaded guilty to stealing \$3,337.89 from the United States. The court-martial sentenced him to a bad-conduct discharge, confinement for one year, and reduction to Private E1.

The military judge allowed the trial counsel to rebut the statement with evidence of a nine-year-old record of non-judicial punishment for bad checks and a nine-year-old letter of reprimand for misplacing government property.<sup>48</sup> Appellate defense counsel challenged the evidence as improper rebuttal, but the Air Force Court of Military Review held it admissible on the theory that it rebutted the accused's oral, unsworn statement.<sup>49</sup> The Court of Military Appeals, however, reversed the Air Force Court of Military Review's decision, holding that the accused's unsworn statement was not a statement of fact as to which evidence of prior misconduct would be admissible for rebuttal.<sup>50</sup>

Chief Judge Everett, writing for the Court of Military Appeals, noted that Cleveland's statement was of an opinion, not of a fact. Indeed, he said it was more of an argument as to the meaning of certain defense exhibits. Moreover, contrary to the lower court's view, Chief Judge Everett and Judge Cox felt the evidence of uncharged misconduct did nothing to "explain" the remark.<sup>51</sup>

In another case, the Court of Military Appeals recently held that testimony of a victim's psychologist, that based on her examination of the victim the accused's unsworn statement must be untrue, was not admissible to rebut the

unsworn statement. In *United States v. Partyka*<sup>52</sup> a court-martial convicted the accused of carnal knowledge and sodomy. During his unsworn statement, the accused stated that, on a couple of occasions, the victim threatened to report that he had raped her if he would not have sex with her. The trial counsel then called the victim's psychologist on rebuttal to say that, because of the dynamics of her relationship with her stepfather, who had also been molesting her, the victim would not have made the threats alluded to by the accused. The psychologist would also rebut, the trial counsel said, the accused's attempt to place most of the blame for the victim's trauma on her stepfather.<sup>53</sup>

Chief Judge Everett, again writing for the court, noted that the proper form of rebuttal in this case would have been for the trial counsel to recall the victim for testimony denying the threats. The court cannot accept expert witnesses as "human lie detectors" of the accused. Additionally, any attempt in Partyka's unsworn statement to shift blame from himself was not a proper subject for rebuttal as it did not amount to a statement of fact.<sup>54</sup>

The unsworn statement can be a valuable strategic tool for the defense, but its effectiveness can be undermined if the defense counsel does not vigorously protect it against improper rebuttal evidence. Captain Edward T. Keable.

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<sup>48</sup> *Id.* at 363.

<sup>49</sup> *United States v. Cleveland*, 27 M.J. 530 (A.F.C.M.R. 1988).

<sup>50</sup> *Cleveland*, 29 M.J. at 363.

<sup>51</sup> 29 M.J. at 363-64.

<sup>52</sup> 30 M.J. 242 (C.M.A. 1990).

<sup>53</sup> 30 M.J. at 244-46. Trial counsel apparently initially planned to call the psychologist in aggravation. However, since the psychologist was not present, the trial counsel elected to rest without calling her. *Id.* at 247 n.7.

<sup>54</sup> 30 M.J. 246-47.

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## *Government Appellate Division Note*

### **Larceny: An Old Crime With a New Twist**

*Major Maria C. Fernandez*  
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#### **Introduction**

A frequently prosecuted crime in our military justice system is larceny. Because attorneys generally encounter larceny in the prosecution of shoplifting and barracks theft, many advocates involved in trying murders, rapes,

and robberies perceive the crime of larceny as a mundane, "run of the mill" offense. A complete understanding of the offense of larceny can open the door to interesting challenges in the prosecution of misconduct involving this offense. Accordingly, a historical over-

view of the offense and how the Manual for Courts-Martial interprets it should assist counsel in formulating new approaches in prosecuting larceny offenses.

### Common Law Larceny Distinctions

Larceny is one of the oldest crimes recognized by the English common law.<sup>1</sup> The common law defined larceny as a trespassory taking and carrying away of the property of another from his possession.<sup>2</sup> The concept of the trespassory taking included the element of asportation. Asportation, which requires the carrying away or the movement of the property, however slight, was crucial under common law larceny.<sup>3</sup> The physical taking away required for larceny must be without the consent of the owner. Under the common law, the taking had to occur in the presence of the owner. The law established this requirement because larceny by taking was not a crime against property, but rather, a judicially-created crime to prevent breaches of the peace.<sup>4</sup>

With the growth of commerce in England and the development of different commercial transactions, such as warehousing and other various types of bailment situations, the crime of larceny was unable to reach certain irregularities that transpired during these new and varying commercial enterprises.<sup>5</sup> The commercial bailment appeared to cause the greatest problem for the British jurists. The courts struggled with how to punish an errant bailee who, without the permission of the owner, opened a crate belonging to the bailor and stole the contents. In such a case, the bailee was in lawful possession of the package at the time of the misappropriation of the items contained therein. He did not engage, therefore, in the taking from the possession of the owner who was possibly several hundred miles away and unable to exercise the requisite physical possession as required for larceny by taking. Under these circumstances, an accused bailee

would escape punishment because he technically had not committed a larceny as defined by the courts.

Likewise, a problem arose concerning how to punish an offender's converting property in his lawful possession within the context of the master-servant relationship.<sup>6</sup> To punish the unlawful withholding and conversion of the property of another that was initially in the lawful possession of the wrongdoer, Parliament created the crime of embezzlement in the eighteenth century.<sup>7</sup> Parliament created embezzlement to fill the gap left by the common law crime of larceny by taking. Unlike common law larceny, the crime of embezzlement does not require that the offender take the property from the possession of the lawful owner. Rather, embezzlement is the fraudulent conversion of the property of another by someone who is already in lawful possession of the property. As such, the crime of embezzlement neither requires asportation nor a trespassory taking. An intent to deprive the owner of possession of the property for the benefit of the embezzler or of another person, however, must accompany the withholding of the property and its fraudulent conversion.<sup>8</sup>

A company clerk, in whom the commander has entrusted the safekeeping of a coffee fund, may demonstrate a classic example of embezzlement. Assume the commander selected the clerk to collect the coffee fund money for the purpose of purchasing coffee, cups, sugar and other items required by the office coffee group. Once he has collected the contributions, the clerk is in lawful possession of the coffee fund money. Assume, however, that later he decides to appropriate the money for his own use and benefit. Because he initially had been in lawful possession, the conversion of the money with intent to deprive the other coffee fund contributors of the money constitutes an embezzlement of the funds. Had the commander not entrusted him with the funds initially, his taking of the money directly from the coffee "contribution cup" would have constituted a larceny.

<sup>1</sup>W. LaFave & A. Scott, *Criminal Law* 703 (2d ed. 1986).

<sup>2</sup>*Id.* at 702-03.

<sup>3</sup>*Id.* at 715-16.

<sup>4</sup>*Id.* at 702

<sup>5</sup>*Id.* at 702-04.

<sup>6</sup>*Id.* at 704-05. The problem posed by the master-servant relationship surfaced in *Bazeley's Case*, 2 East P.C. 571 (Cr. Was. Res. 1799). A bank had hired the accused as a clerk, and as part of his duties he was to accept deposits on behalf of his employer. On the day in question, rather than placing the deposit in the cash drawer, he placed the money in his pocket, intending to keep it for his own use and benefit. The court refused to apply to the facts the legal fiction of constructive possession. The crucial aspect of the constructive possession theory is that the owner hands over his property to a bailee but is still, technically, in constructive possession of the property. In the bank clerk's situation, however, the money came to the bank teller from a third person. As such, the money perceptively did not pass to the bank until a clerk had placed it in a cash drawer. The court found the bank teller not guilty of larceny and no other offense existed that made his conduct criminal. See generally *id.*

<sup>7</sup>W. LaFave & A. Scott, *supra* note 1, at 705.

<sup>8</sup>*Id.* at 729.

In contrast to embezzlement, the crime of obtaining by false pretenses, first recognized by the English Parliament in 1757, does not involve a trespassory taking or an unlawful withholding.<sup>9</sup> Traditionally, obtaining by false pretenses required that the offender make false representations of a material present or past fact to induce the owner to part with the property.<sup>10</sup> The wrongdoer making the false representations must believe the representation is wrong at the time he makes it.<sup>11</sup> He must also intend to defraud the rightful owner not only of possession, but of total ownership, of the property. Furthermore, title to the property must pass to the offender as the result of the false misrepresentation. If the offender does not acquire title to the property as the result of the false pretenses, then he has not committed the offense of obtaining under false pretenses. If, however, the owner of the property parts with the property based on the misrepresentations made by the wrongdoer who acquires possession, the wrongdoer has committed the crime of larceny by trick. Larceny by trick, unlike obtaining by false pretenses does not require the passing of title to the property by false inducement. It instead requires the fraudulent transfer of possession, based on the false representation of a past or present fact by the offender, to acquire possession.<sup>12</sup>

A historical analysis of the offenses of common law larceny by taking, larceny by trick, embezzlement, and false pretenses clearly indicates that each of these offenses have distinct elements of proof. Arguably, the elemental differences that exist among the various forms of larceny are of no moment to a victim of whom the perpetrator has deprived property by acting as either a thief, a liar or an embezzler. Nevertheless, the fact that these offenses have traditionally incorporated different elements is significant as to the theory of prosecution that the trial counsel will pursue in court. Counsel must therefore, recognize these distinctions when prosecuting larceny offenses.

## Larceny as Defined in Article 121

The larceny provision contained in the Manual for Courts-Martial consolidates the various types of larceny discussed above as one offense under Uniform Code of Military Justice article 121.<sup>13</sup> Article 121 consolidates the wrongful taking, obtaining or withholding of the property of another as a larceny chargeable under that single article. Article 121 thus defines all of the offenses of larceny as the wrongful taking, obtaining, or withholding of property of a certain value from the possession of the owner with the intent permanently to deprive or defraud the owner of the use and benefit of the property, or to appropriate the property for the use of the accused or for any one other than the owner.<sup>14</sup> A prosecutor, therefore, can charge and prove any of the various types of common law and parliamentary enacted crimes that the law traditionally recognized by using a specification alleging that the accused "did steal" the property in question.<sup>15</sup>

The Manual for Courts-Martial (1984), Part IV, paragraph 121c, explains the comprehensive coverage of the modern crime of larceny that article 121 now proscribes. A wrongful taking with intent to permanently deprive constitutes the common law crime of larceny. The offense under article 121 requires a trespassory taking and asportation, as the common law required. The taking must be wrongful, which the government may prove with evidence that the offender did the taking without the consent of the owner. Furthermore, the government must present evidence of asportation, however slight, to prove that the accused exercised dominion and control over the property.<sup>16</sup>

A wrongful withholding with intent to permanently appropriate constitutes the offense of embezzlement. For it to be wrongful, the offender must withhold the property of another with the intent to appropriate the property

<sup>9</sup>*Id.* at 739-45.

<sup>10</sup>*Id.* at 740.

<sup>11</sup>*Id.* at 741-49.

<sup>12</sup>*Id.* at 711.

<sup>13</sup>Uniform Code of Military Justice art. 121, 10 U.S.C. § 921 (1982) [hereinafter UCMJ]; see Manual for Courts-Martial, United States, 1984, Part IV, para. 46c(1)(a) [hereinafter MCM, 1984].

<sup>14</sup>MCM, 1984, Part IV, para. 46b.

<sup>15</sup>MCM, 1984, Part IV, para 46c.(1)(a).

<sup>16</sup>United States v. Epps, 25 M.J. 319 (C.M.A. 1987). The *Epps* case emphasizes the importance of the element of asportation in the offense of larceny by taking. Epps' co-accused removed \$90.00 from the victim's wallet while Epps looked on. Epps denied knowing that his co-accused intended to steal the money when they entered the room, but he did accept at the scene two \$20 bills taken from the wallet by his co-accused. In upholding Epps' conviction for larceny, the court held that asportation had not taken place before the co-accuseds had divided the money, and therefore Epps was guilty as a perpetrator of stealing the two \$20 bills.

permanently without the owner's consent. The initial possession, unlike with the traditional concept of embezzlement, may be either lawful or unlawful.<sup>17</sup> The withholding may result from failure to return, account for, or deliver property to its owner when required to do so, even if the owner makes no demand for proper disposition.

The portion of article 121 that addresses wrongful obtaining with intent permanently to defraud penalizes obtaining the property of another under false pretenses. Three striking differences are apparent between the traditional offense of obtaining by false pretenses and the offense of obtaining by false pretenses pursuant to article 121. First, under article 121, the mere acquisition of title from the owner is not sufficient to show wrongful obtaining. Rather, the accused must exercise dominion and control over the property once title has passed to him. Second, as possession of the property by false pretenses without the transfer of title suffices, this element of article 121 is more like the traditional crime of larceny by trick, rather than the traditional offense of obtaining by false pretenses. Third, although article 121 requires the false representation of a past or existing fact, a false representation that a person presently intends to perform an act at some future date—that is, a false representation of an existing fact as to a person's intentions—also constitutes a false representation of an existing fact.<sup>18</sup>

The consolidation of wrongfully taking, obtaining, and withholding under the catchall offense of larceny results in simplified pleading.<sup>19</sup> All the government need do in drafting the specification is allege that the accused did steal a certain item of value from its owner. At trial, government counsel need not select whether he will show that the accused committed larceny by wrongful taking, withholding, or obtaining. Instead, trial counsel, pursuant to the consolidated form of the charge, can present evidence as to all four forms of larcenous conduct, or any of the four (to include larceny by trick), and still make a prima facie case as to the first element of larceny. In

effect, the consolidated larceny statute gives the trial counsel the flexibility of not committing to one theory of the case because the first element under article 121 comprises only a disjunctive requirement, demanding the government merely to prove an unlawful taking, withholding, or obtaining.

Consequently, the consolidation of larceny offenses under article 121 allows for a "letting the chips fall where they may" approach to prosecution. Simplification as to pleading and proof disregards the fact that article 121 subsumes four<sup>20</sup> distinct forms of larceny that traditionally have required different elements of proof. This simplification in pleading allows the government to present evidence as to the four types of larceny included in article 121 without electing a particular theory prior to the presentation of evidence. The government's theory of prosecution is then subject to the exigencies of proof. Moreover, if for example, the government elects to try an accused pursuant to an embezzlement theory and the evidence instead shows that the offender committed the larceny by obtaining under false pretenses, the factfinder can return a finding of guilty by exceptions and substitutions on the latter offense. Under a consolidated statute that provides for a simplified form of pleading, as exemplified by article 121 and the Manual for Courts-Martial's sample larceny specification, the presentation of a defense as to one type of larceny does not preclude a finding of guilty as to any of the other types of larceny incorporated in the statute. Aggressive counsel should not overlook this result, and its potential for converting a losing case into a "winner."

At times, the trial judge may request the trial counsel to articulate the theory of larceny upon which he or she will prosecute prior to the presentation of the government's case. Such a request may present a problem when the evidence remains uncertain as to which type of larceny is applicable or when counsel is unaware of the defense that his opponent will present. Under these circumstances, trial counsel should defer articulating the

<sup>17</sup>MCM, 1984, Part IV, para 46c(1)(b). In the case of *United States v. Moreno*, 23 M.J. 622 (A.F.C.M.R. 1986), *pet. denied*, 24 M.J. 348 (C.M.A. 1987), the Court of Military Appeals held that to sustain a conviction of the offense of larceny by withholding, the accused's initial possession need not be unlawful. In *Moreno* the bank had mistakenly transferred the amount of \$10,000 to the accused's account. The accused then transferred a portion of that money into an account at a different bank. The accused's denial of knowledge of the deposit when questioned, together with the subsequent transfer of the money, were sufficient acts of dominion over the property to demonstrate an intent to steal even though his initial possession of the money was innocent.

<sup>18</sup>MCM 1984, Part IV, para. 46c(1)(e).

<sup>19</sup>*Id.* para. 46(f)(1). The sample specification reads as follows:

In that \_\_\_\_\_ (personal jurisdiction data), did, (at/onboard location) (subject-matter jurisdiction data, if required), on or about \_\_\_\_\_ 19\_\_\_\_, steal \_\_\_\_\_, (military property), of a value of (about) \$\_\_\_\_\_, the property of \_\_\_\_\_

<sup>20</sup>In view of the fact that an offender commits obtaining by false pretenses either if title passes to the wrongdoer, or if he obtains possession of the item without the transfer of title, the offense of wrongfully obtaining by its definition incorporates the common law crime of larceny by trick.

theory of prosecution until the closing of the government's case or, if possible, at the termination of the defense's case. Deferring will allow counsel to conform the government's theory of the case to the evidence presented. If confronted with a bill of particulars and an uncertainty about which theory he or she will pursue at trial, trial counsel should list all possible theories of larceny subject to proof or in anticipation of potential defenses in response to the bill of particulars. Pleading and arguing alternative theories, such as the wrongful taking and the unlawful withholding of a vehicle, also addresses the problem and allows enough flexibility to accommodate the exigencies of proof problem faced in many larceny prosecutions.

## Conclusion

Counsel involved in the prosecution of article 121 offenses should be aware that the art of advocacy is still very much alive when it comes to the offense of larceny. The consolidation of the four types of larcenies under one charge has simplified the charging of various larceny offenses. The simplified form of pleading, however, should not lull counsel into a false sense of security in view of the fact that the offense of larceny encompasses four different offenses. Counsel should be aware of this and prepare the case accordingly. The element of challenge is still present in an old crime with a potentially new twist.

## Clerk of Court Notes

### Did Your Office Receive a Copy of Our Checklist?

In the production of initial court-martial promulgating orders, two problems loom large for the Judge Advocate General's Corps.

First, although the form for initial promulgating orders has permitted summarized specifications for six years, many staff judge advocate offices still have not learned how to summarize specifications properly. From the charge sheet specification, authors often merely delete the identification of the accused and the verb "did" and then include all the rest of the information. That produces an ungrammatical statement (no verb or verb with incorrect tense) reflecting adversely on the author and the command. In addition, when an accused pleads to, or the court finds the accused guilty of, a lesser included offense, the same author often merely recites the exceptions and substitutions when, instead, he or she should summarize the plea or finding to reveal the name of the lesser included offense.

Second, in the past six years the frequency with which the Army Court of Military Review must correct substantive errors in promulgating orders has increased twenty percent. Accordingly, the court must correct almost one in ten initial promulgating orders. Ten percent of the corrections pertain to errors or omissions in essential dates, such as the date of sentencing, date of the convening authority's action, or date of the order (which must be the same as the date of the action). Another twenty percent are errors in the accused's grade, name, or service number. In today's computerized world, service number errors inadvertently may affect innocent people. Fully sixty percent of the corrections involve errors or omissions in either a specification describing an offense, or in the related plea and finding or other disposition.

Without correction, these orders are useless—in fact, misleading—to their intended users: personnel officers, finance officers, confinement officers, administrators of

veterans' benefits, attorneys in future cases in which the accused is a party or witness, and the public.

In late July, we distributed to general court-martial jurisdictions a new Checklist for Preparing and Reviewing Summarized Initial Court-Martial Promulgating Orders. If somehow your office did not receive a copy, please telephone us at Autovon 289-1888 and ask us to send a copy to you. We hope using the Checklist will improve the quality and accuracy of promulgating orders. We hope, too, those who use it will give us the benefit of their suggestions for improving the Checklist and/or the format and content of court-martial orders as well.

### Court-Martial Processing Times, FY 1990

The table below shows the Armywide average processing times for general courts-martial and bad conduct discharge special courts-martial for the first two quarters of Fiscal Year 1990.

#### General Courts-Martial

|   | 1st Qtr | 2d Qtr |
|---|---------|--------|
| Records received by Clerk of Court          | 409     | 441    |
| Days from charging or restraint to sentence | 45      | 40     |
| Days from sentence to action                | 55      | 53     |
| Days from action to dispatch                | 6       | 6      |
| Days from dispatch to receipt by the Clerk  | 12      | 10     |

#### BCD Special Courts-Martial

|   | 1st Qtr | 2d Qtr |
|---|---------|--------|
| Records received by Clerk of Court          | 121     | 152    |
| Days from charging or restraint to sentence | 30      | 29     |
| Days from sentence to action                | 42      | 47     |
| Days from action to dispatch                | 5       | 4      |
| Days from dispatch to receipt by the Clerk  | 10      | 9      |

# TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

## Criminal Law Notes

### Breach of the Peace Under Military Law

Article 116 of the Uniform Code of Military Justice<sup>1</sup> proscribes the offense of breach of the peace.<sup>2</sup> As the Air Force Court of Military Review's recent opinion in *United States v. Taylor*<sup>3</sup> illustrates, not all violent and unruly conduct in a public place will constitute this crime. Rather, breach of the peace is limited to those acts that disturb the public tranquility or impinge upon peace and good order.

The accused in *Taylor* was arguing with his wife when the latter said that she wanted to cash a check and go out to eat.<sup>4</sup> The checkbook was in the family car.<sup>5</sup> In what the appellate court characterized as "a fit of pique," the accused went outside and slashed the tires on the car with a knife.<sup>6</sup> Significantly, "no evidence was presented that any member of the public had been disturbed by the tire slashing."<sup>7</sup> Based upon those facts, a court-martial tried and convicted the accused of breach of the peace.<sup>8</sup>

Under military law, the offense of breach of the peace has the following two elements:

- (a) That the accused caused or participated in a certain act of a violent or turbulent nature; and

- (b) That the peace was thereby unlawfully disturbed.<sup>9</sup>

Few reported decisions by the military's courts and boards have considered breach of the peace in any useful detail. Probably the most comprehensive discussion of the offense prior to *Taylor* is found in the Court of Military Appeals' decision in *United States v. Hewson*.<sup>10</sup> The accused in *Hewson* was confined in the stockade at Fort Richardson, Alaska, when he engaged in the conduct giving rise to the breach of the peace charge against him.<sup>11</sup> Specifically, the accused shouted loudly, struck the bars in his cell, shook his cell door, and jumped and kicked inside of his cell and on his bunk.

The *Hewson* court first examined the civilian origins of breach of the peace. The court observed that at common law breach of the peace occurs when the accused engages in conduct that involves "either actually breaking the *pax regis*[<sup>12</sup>] or tending to provoke or excite others to break it."<sup>13</sup> The gravamen of the offense was the protection of a community from the disturbing conduct of another. Thus, by proscribing breaches of the peace, the government intended to protect the right of people in general to exist quietly and peacefully.<sup>14</sup> Indeed, the

<sup>1</sup>Uniform Code of Military Justice art. 116, 10 U.S.C. § 916 (1982) [hereinafter UCMJ] ("Any person subject to this chapter who causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct.").

<sup>2</sup>*Id.* Breach of the peace is a lesser included offense or riot, which article 116 also proscribes. For a recent discussion of the offense of riot, see TJAGSA Practice Note, *Rioting as an Offense Under Military Law*, *The Army Lawyer*, June 1990, at 50 (discussing *United States v. Fisher*, 29 M.J. 698 (A.C.M.R. 1990)).

<sup>3</sup>30 M.J. 882 (A.F.C.M.R. 1990).

<sup>4</sup>*Id.* at 883.

<sup>5</sup>*Id.* The couple had registered the car in the wife's name, but the accused had purchased the car and paid for the tires. *Id.*

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>*Id.* at 882.

<sup>9</sup>Manual for Courts-Martial, United States, 1984, Part IV, para. 41b(2) [hereinafter MCM, 1984].

<sup>10</sup>33 C.M.R. 38 (C.M.A. 1963).

<sup>11</sup>*Id.* at 39.

<sup>12</sup>See generally Black's Law Dictionary 1285 (4th ed. 1968). "*Pax regis*" is:

[t]he peace of the king; that is, the peace good order, and security for life and property which it is one of the objects of government to maintain, and which the king, as the personification of the power of the state, is supposed to guaranty to all persons with the protection of the law.

*Id.*

<sup>13</sup>*Id.* (quoting 4 Blackstone, Commentaries (Ewell's 2d ed.), page 683, *et seq.*)).

<sup>14</sup>*Hewson*, 33 C.M.R. at 40.

discussion of the offense in the 1984 Manual for Courts-Martial reflects this rationale.<sup>15</sup>

Accordingly, the court in *Hewson* concluded that breach of the peace does not require necessarily that the accused's acts occurred in a location that society typically considers to be a "public place." Rather, the accused's conduct satisfies the requirements for breach of the peace if his "behavior, not otherwise protected or privileged, tends to invade the right of the public or its individual members to enjoy a tranquil existence,"<sup>16</sup> regardless of where it occurs. The *Hewson* court held, therefore, that the accused was guilty of a breach of the peace even though the general public did not have regular access to the stockade.<sup>17</sup>

Conversely, mere violent or unruly conduct that occurs at a "public place" does not necessarily constitute a breach of the peace. Although the acts at issue in *Taylor* took place on a public street,<sup>18</sup> the evidence failed to establish that Taylor's conduct disturbed anyone other than his wife.<sup>19</sup> Because the accused's conduct did not disturb the "community" or "public,"<sup>20</sup> the court could not affirm his conviction for a breach of the peace as a matter of law. As the majority in *Taylor* concluded, "It's a free country; slashing one's own car tires to 'get even' with a spouse may be foolish or irrational. Without more, we are unprepared to say it is criminal conduct sufficient to violate Article 116, UCMJ."<sup>21</sup>

<sup>15</sup> See MCM, 1984, Part IV, para. 41c(2). The MCM states the following:

[a] "breach of the peace" is an unlawful disturbance of the peace by an outward demonstration of a violent or turbulent nature. The acts or conduct contemplated by this article are those which disturb the public tranquility or impinge upon the peace and good order to which the community is entitled. Engaging in an affray and unlawful discharge of firearms in a public street are examples of conduct which may constitute a breach of the peace. Loud speech and unruly conduct may also constitute a breach of the peace if the speaker uses language which can reasonably be expected to produce a violent or turbulent response and a breach of the peace results. The fact that the words are true or used under provocation is not a defense, nor is tumultuous conduct excusable because incited by others.

*Id.*

<sup>16</sup> *Hewson*, 33 C.M.R. at 40.

<sup>17</sup> *Id.* at 40-41. To support its ruling that a prisoner may be guilty of breach of the peace, even though a stockade is not a public place, the court explained that,

[o]ther prisoners, just as the ordinary citizen, are entitled peacefully to enjoy the limited accommodations afforded by their incarceration for, though their normal freedom and privileges are curtailed by the imposition of confinement, they nonetheless remain members of the public entitled to protection against breach of the peace. The same consideration applies to guards, administrative personnel, and others who, as free individuals, work and frequently live at stockades or prisons. These, too, are entitled to pursue their lives free from undue disturbance and tumultuous invasion of their right to enjoy quietude.

*Id.* at 41.

<sup>18</sup> See *Taylor*, 30 M.J. at 883. The dissenting judge emphasized that the car "was parked on a public street." *Id.*, at 886 (Blommers, J., concurring in part and dissenting in part) (emphasis omitted).

<sup>19</sup> *Id.* at 883.

<sup>20</sup> See generally MCM, 1984, Part IV, para. 41c(3) (defining the terms "community" and "public" as including "a military organization, post, camp, ship, aircraft, or station.").

<sup>21</sup> *Id.*

<sup>22</sup> CM 893600 (N.M.C.M.R. 5 Apr. 1990).

<sup>23</sup> 30 M.J. 829 (N.M.C.M.R. 1990).

<sup>24</sup> See UCMJ art. 80; MCM, 1984, Part IV, para. 4.

<sup>25</sup> 24 M.J. 286 (C.M.A. 1987).

<sup>26</sup> UCMJ art. 80(a).

The military's appellate courts have had few opportunities to consider and apply the substantive requirements of UCMJ article 116. Trial and appellate practitioners having cases involving breach of the peace therefore should become familiar with *Taylor* and *Hewson*, and the guidance they provide. Major Milhizer.

### Voluntary Abandonment as a Defense to Attempts

In the recent cases of *United States v. Miller*<sup>22</sup> and *United States v. Walther*,<sup>23</sup> the Navy-Marine Court of Military Review accepted and applied voluntary abandonment as an affirmative defense to attempt offenses.<sup>24</sup> *Miller* and *Walther* are significant because they are the first military cases to apply the defense to a consummated attempt since the Court of Military Appeals' recognition three years earlier in *United States v. Byrd*.<sup>25</sup> These recent cases also provide useful guidance regarding the scope and limitations of voluntary abandonment.

Before discussing *Miller* and *Walther* in detail, a brief review of the defense of voluntary abandonment under military law is appropriate. Uniform Code of Military Justice (UCMJ) article 80, in part, defines an attempt under military law as, "[a]n act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense."<sup>26</sup> All attempt offenses thus have the following four elements of proof:



- (1) That the accused did a certain overt act;<sup>[27]</sup>
- (2) That the act was done with the specific intent to commit a certain offense under the code;<sup>[28]</sup>
- (3) That the act amounted to more than mere preparation;<sup>[29]</sup> and
- (4) That the act apparently tended to effect the commission of the intended offense.<sup>30</sup>

Traditional military law did not permit a defense of voluntary abandonment to an attempt charge.<sup>31</sup> For example, the 1921 Manual for Courts-Martial expressly rejected the defense,<sup>32</sup> as did various courts and boards of review.<sup>33</sup> Indeed, in *United States v. Thomas*<sup>34</sup> the Court of Military Appeals concluded that once an accused's misconduct satisfies all of the elements of an attempt offense under article 80, a violation of article 80 is complete. Furthermore, the court concluded that military law does not recognize any other requirements of proof or defenses that modify the established elements of attempts, such as factual impossibility or abandonment.<sup>35</sup>

Chief Judge Everett announced an important change to this law in *United States v. Byrd*.<sup>36</sup> Citing the greater weight and persuasive rationale of civilian authority on the subject, he wrote that "the affirmative defense of voluntary abandonment must be recognized in military justice."<sup>37</sup> However, the precedential significance of this portion of Chief Judge Everett's opinion was then

unclear.<sup>38</sup> He also concluded in *Byrd* that evidence that showed that an accused's conduct did not go beyond mere preparation formed a second discrete basis for setting aside the accused's pleas of guilty to attempted drug distribution.<sup>39</sup> Judge Sullivan, who was new to the Court of Military Appeals, did not participate in the *Byrd* decision.<sup>40</sup> However, Judge Cox, although "admit[ting] ... that [he was] very impressed with the Chief Judge's learned opinion" regarding voluntary abandonment, declined to join in it because of his oft-stated "reservations about making substantive law on a guilty plea record ..."<sup>41</sup> Judge Cox instead concurred in the result because he similarly concluded that the accused's conduct did not go beyond mere preparation.<sup>42</sup>

The first reported cases discussing voluntary abandonment following *Byrd* likewise did not adopt expressly the defense of voluntary abandonment. In *United States v. Newman*,<sup>43</sup> for example, the Army Court of Military Review concluded that the factual posture of the case did not require the court to decide whether the evidence raised the defense of voluntary abandonment.<sup>44</sup> Similarly, in *United States v. Church*<sup>45</sup> the Air Force Court of Military Review made reference to the voluntary abandonment defense as discussed in *Byrd*, but did not apply the defense in affirming the accused's conviction for attempted murder.<sup>46</sup>

The first appellate reversal of a court-martial conviction for an attempt offense because of the defense of

<sup>27</sup>MCM, 1984, para. 4b(1). The government need not actually allege an overt act in an attempt specification. See *United States v. Marshall*, 20 C.M.R. 138 (C.M.A. 1969). The government also need not prove that an alleged overt act was criminal. See *United States v. Johnson*, 22 C.M.R. 278 (C.M.A. 1957).

<sup>28</sup>MCM, 1984, para. 4b(2); see *United States v. Roa*, 12 M.J. 210 (C.M.A. 1982) (attempted murder requires that the accused have a specific intent to kill); *United States v. Sampson*, 7 M.J. 513 (A.C.M.R.) (even though rape is a general intent crime, attempted rape is a specific intent crime), *pet. denied*, 7 M.J. 468 (C.M.A. 1979).

<sup>29</sup>MCM, 1984, Part IV, para. 4b(3); see also *id.*, para. 4c(2); *United States v. Hyska*, 29 M.J. 122 (C.M.A. 1989); *United States v. Presto*, 24 M.J. 350 (C.M.A. 1987); *Byrd*, 24 M.J. at 289-90 (establishing and applying the "substantial step test" to distinguish between a sufficient overt act for an attempt offense and mere preparation).

<sup>30</sup>MCM, 1984, Part IV, para. 4b(4). As to the last element, see *Johnson*, 22 C.M.R. 278 (C.M.A. 1957).

<sup>31</sup>But see *United States v. Miasel*, 24 C.M.R. 184 (C.M.A. 1957) (holding that military law has long recognized that an actor's effective and voluntary abandonment or withdrawal from a conspiracy will terminate his criminal liability for that offense); cf. MCM, 1984, Part IV, para. 5c(6).

<sup>32</sup>Manual for Courts-Martial, United States, 1921, para. 417; see Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951 248-49 (1951).

<sup>33</sup>E.g., *United States v. Gugliotta*, 23 M.J. 905 (N.M.C.M.R. 1987); *United States v. Valenzuela*, 15 M.J. 699, 701 (A.C.M.R. 1983); *United States v. Jones*, 13 C.M.R. 420, 422-23 (A.B.R. 1953).

<sup>34</sup>22 C.M.R. 278 (C.M.A. 1962).

<sup>35</sup>*Id.* at 286-88.

<sup>36</sup>24 M.J. 286 (C.M.A. 1987).

<sup>37</sup>*Id.* at 292-93.

<sup>38</sup>See generally TJAGSA Practice Note, *Fleeing Apprehension is Not Resisting Apprehension*, The Army Lawyer, Dec. 1989, at 35, 37.

<sup>39</sup>*Byrd*, 24 M.J. at 289-90.

<sup>40</sup>*Id.* at 293.

<sup>41</sup>*Id.* (Cox, J., concurring).

<sup>42</sup>*Id.*

<sup>43</sup>25 M.J. 604 (A.C.M.R. 1987).

<sup>44</sup>*Id.* at 606 n.5.

<sup>45</sup>29 M.J. 679 (A.F.C.M.R. 1989).

<sup>46</sup>*Id.* at 687.

voluntary abandonment appeared in *United States v. Walther*.<sup>47</sup> The accused in *Walther* pleaded guilty, *inter alia*, to attempted larceny of a car stereo. During the providence inquiry the accused told the military judge that upon entering the car, "he realized he was doing wrong and changed his mind."<sup>48</sup> The court of review noted that the accused had "done nothing to physically remove the radio from the car;" and found that "[n]othing in the record indicates that [the accused's] failure to proceed with the theft was motivated by increased probability of detection or apprehension, or due to any outside cause."<sup>49</sup>

The court of review concluded in *Walther* that the accused's statements raised the defense of voluntary abandonment. Citing *Byrd* and public policy reasons favoring the defense, the court in *Walther* expressly recognized that voluntary abandonment can act as a defense to a consummated attempt offense.<sup>50</sup> The court concluded that the military judge's failure to resolve adequately the accused's inconsistent testimony concerning the abandonment issue during providency required the court to set aside the accused's pleas of guilty to attempted larceny.<sup>51</sup>

Central to the court's decision in *Walther* was its conclusion regarding the accused's reasons for abandoning the theft. The court wrote:

There is no indication from the record that [the accused] abandoned that attempt due to an outside cause; indeed, the only indication is that he abandoned his attempt owing to his own sense that it was wrong. The absence of any other cause for this abandonment, such as unanticipated difficulties, unexpected resistance, or circumstances which

increased the likelihood that he would be detected and apprehended, reinforces the potential defense of voluntary abandonment.<sup>52</sup>

These limitations upon the defense of voluntary abandonment, as cited by the court in *Walther*, are consistent with the limitations recognized by the Court of Military Appeals in *Byrd*.<sup>53</sup>

In the second case to apply the defense of voluntary abandonment, *United States v. Miller*,<sup>54</sup> the accused pleaded guilty, *inter alia*, to attempted breaking restriction. The accused acknowledged during the providence inquiry that his commanding officer had restricted him to his ship.<sup>55</sup> Sometime later, the accused, desiring to depart the ship, posed as a food service attendant. These attendants were free to go to and from the ship. While in this disguise, the accused walked toward an exit at the bow of the ship with the intent of departing the ship and thereby breaking restriction. The accused came within ten feet of the bow when he saw the watchstander. The accused was acquainted with the watchstander, who could recognize the accused and who knew that the commanding officer had restricted the accused to the ship. Because of the accused's fear of the watchstander's identifying him, he continued to walk past the bow without trying to leave the ship.

Having first determined that the accused had consummated an attempt offense, the court in *Miller* addressed the issue of whether the accused had raised the defense of voluntary abandonment. The court concluded that the accused did not raise the defense since he abandoned his attempted crime only because of unanticipated circumstances that increased someone's chances of recognizing and apprehending him.<sup>56</sup> Finding no genuine change of

<sup>47</sup>30 M.J. at 829.

<sup>48</sup>*Id.* at 830.

<sup>49</sup>*Id.*

<sup>50</sup>*Id.* at 832. Applying the theory that voluntary abandonment can act as a defense to a consummated attempt offense, the court concluded that the accused's actions had gone beyond mere preparation and that his misconduct had otherwise constituted a completed attempt. *Id.*

<sup>51</sup>*Id.* at 833.

<sup>52</sup>*Id.* at 832.

<sup>53</sup>Chief Judge Everett observed in *Byrd* that voluntary abandonment—

... has only been applied when an individual abandons his intended crime because of a change of heart; and it has not been allowed when the abandonment results from fear of immediate detection or apprehension, see *United States v. Jackson*, 560 F.2d 112 [(2d Cir. 1977)], the decision to await a better opportunity for success; or inability to complete the crime, see *United States v. McDowell*, 714 F.2d 106 (11th Cir. 1983); *United States v. Rivera-Sola*, 713 F.2d 866 (1st Cir. 1983).

*Byrd*, 24 M.J. at 292 (emphasis in original).

<sup>54</sup>CM 893600 (N.M.C.M.R. 5 Apr. 1990).

<sup>55</sup>*Id.*, slip op. at 1.

<sup>56</sup>*Id.*, slip op. at 2.

heart on the part of the accused, the court affirmed his conviction for attempted breaking restriction.

Walther and Miller thus expressly recognize one important limitation of the voluntary abandonment defense—the accused must have based his decision to abandon the attempted crime on a genuine change of heart, rather than a fear of apprehension. The courts, however, did not discuss a second and equally important limitation upon the defenses in those cases.

In some circumstances, the court may find an accused guilty of a lesser included substantive crime despite his being entitled to assert voluntary abandonment as a defense. For example, assume an accused charged with attempted rape had voluntarily abandoned his attempt to have intercourse with the victim because of a genuine change of heart. Assume further that, before the accused had this change of heart, he forced the woman to undress at knife point and then fondled her against her will. Although the facts under these circumstances would entitle the accused to assert the affirmative defense of voluntary abandonment as to the attempted rape charge, he would nonetheless be guilty of the lesser included offense of indecent assault.<sup>57</sup> None of the policy reasons that underlie recognizing voluntary abandonment as a defense to attempts<sup>58</sup> are inconsistent with this rejection of the defense for lesser included, substantive crimes that the accused may have otherwise committed. Indeed, extending the defense to all lesser included offenses of an attempt charge would create incongruous results. For instance, the law would shield an accused who initially entertained a desire to inflict great criminal harm (rape, for example) from all criminal responsibility for his misconduct if he had a last minute change of heart, while the law would hold an accused who initially intended to com-

mit only a less serious offense (indecent assault, for example) criminally responsible for the same misconduct.

Thus far, only the Navy-Marine Court of Military Review has recognized expressly and applied the defense of voluntary abandonment. However, given Chief Judge Everett's persuasive opinion in *Byrd* and Judge Cox's concurring comments in that case, trial practitioners from all of the services should operate under the premise that the law permits voluntary abandonment as a defense to a consummated attempt under military law. As voluntary abandonment operates as an affirmative defense, military judges must exercise their *sua sponte* duty to instruct upon the defense whenever the evidence raises it.<sup>59</sup> Likewise, judges must ensure that they resolve the defense or reject the pleas of an accused who pleads guilty but also raises the defense.<sup>60</sup> Trial practitioners also must be cognizant of the important limitations that significantly restrict the application of the defense. Major Milhizer.

#### An Order Restricting Accused's Contact With Victims and a Witness Held to be Lawful

As discussed in a previous note,<sup>61</sup> military law has long wrestled with the lawful breadth and scope of military orders and regulations. For example, past Court of Military Appeals decisions have affirmed a disobedience conviction for failing to obey the order of a superior commissioned officer<sup>62</sup> to remove a "friendship or love" bracelet,<sup>63</sup> and for violating a post regulation<sup>64</sup> prohibiting loans between subordinates and superiors.<sup>65</sup> More recently, the court addressed the legality of military orders relating to a variety of subjects, including the so-called "safe-sex" order,<sup>66</sup> an order not to consume alcoholic beverages during a visit in port,<sup>67</sup> and an order

<sup>57</sup> See UCMJ art. 134; MCM, 1984, Part IV, para. 63.

<sup>58</sup> See Model Penal Code § 5.01(4) (Proposed Official Draft 1962). The drafters of the Model Penal Code stated the rationale for recognizing the defense of voluntary abandonment as follows:

On balance, it is concluded that renunciation of criminal purpose should be a defense to a criminal attempt charge because, as to the early stage of an attempt, it significantly negatives dangerousness of character, and as to the latter stages, the value of encouraging desistance outweighs the net dangerousness shown by the abandoned criminal effort.

*Id.* (cited in *Byrd*, 24 M.J. at 291).

<sup>59</sup> *United States v. Steinruck*, 11 M.J. 322 (C.M.A. 1981); *United States v. Sawyer*, 4 M.J. 64 (C.M.A. 1977).

<sup>60</sup> UCMJ art. 45(a). See generally *United States v. Lee*, 16 M.J. 278 (C.M.A. 1983).

<sup>61</sup> TJAGSA Practice Note, *An Order to "Disassociate" Held to Be Lawful*, *The Army Lawyer*, Aug. 1989, at 38.

<sup>62</sup> UCMJ art. 90; see MCM, 1984, Part IV, para. 14.

<sup>63</sup> *United States v. Wartsbaugh*, 45 C.M.R. 309, 313-15 (C.M.A. 1972); see also *Goldman v. Weinberger*, 106 S.Ct. 1310 (1986).

<sup>64</sup> UCMJ art. 92; see MCM, 1984, Part IV, para. 16.

<sup>65</sup> *United States v. McClain*, 10 M.J. 271 (C.M.A. 1981).

<sup>66</sup> *United States v. Dumford*, 30 M.J. 137 (C.M.A. 1990); *United States v. Womack*, 29 M.J. 88 (C.M.A. 1989) (finding "safe-sex" order lawful). See generally Milhizer, *Legality of the "Safe-Sex" Order to Soldiers Having AIDS*, *The Army Lawyer*, Dec. 1988, at 4; TJAGSA Practice Note, *The "Safe-Sex" Order Held to Be Lawful When the "Victim" is a Civilian*, *The Army Lawyer*, Aug. 1990, at 30.

<sup>67</sup> *United States v. Roach*, 29 M.J. 33 (C.M.A. 1989) (holding order not to consume alcoholic beverages during an in-port visit unlawful).

to a female officer to provide a urine sample under direct observation.<sup>68</sup>

In the recent case of *United States v. Hawkins*<sup>69</sup> the Air Force Court of Military Review considered the legality of an order directing the accused to have no further contact with his girlfriend (an airman whom the command accused Hawkins of assaulting), a male airman (whose property the command accused Hawkins of stealing), and a second male airman (who was a witness to the theft), without first contacting the area defense counsel. The court concluded that the order was lawful, and thus affirmed the accused's conviction for disobedience. In so doing, the court found that the order was not overly-broad and did not unreasonably interfere with the accused's constitutional rights.

Prior to the order, the command suspected that the accused in *Hawkins* had committed numerous assaults upon his girlfriend and had stolen a radio from another airman's car.<sup>70</sup> The assaultive conduct occurred over a period of several months and involved the accused's slapping, punching, and kicking his victim.<sup>71</sup> The accused earlier had received a letter of reprimand for similar misconduct against his girlfriend. The assaults were so severe that they disturbed the residents of the airman's dormitory, who summoned security police to respond on at least one occasion.

The accused later became a larceny suspect. He asked his girlfriend and a witness to the theft to make false statements to the investigators to help cover-up his involvement. When both airmen refused, the accused threatened them.

Based upon the foregoing circumstances, the accused's commander personally issued an order to the accused,<sup>72</sup> directing him to have no further verbal or physical contact with his girlfriend, the larceny victim, or the witness to the larceny, without first contacting the area defense counsel.<sup>73</sup> The accused thereafter spent the night with his girlfriend, and again visited her the following day.<sup>74</sup>

Before reaching the issue of the legality of the order in *Hawkins*, the Air Force Court of Military Review wrote that the accused had the burden showing that the order was not lawful.<sup>75</sup> The court observed further that the lawfulness of an order is an interlocutory question of law that the military judge must determine.<sup>76</sup> The court concluded that the accused, who did not contest the legality of the order and pled guilty pursuant to a thorough providence inquiry, waived the issue.<sup>77</sup>

These conclusions may go too far. A better approach places on the government the burden of proving the lawfulness of the order beyond a reasonable doubt, and allows the government to create a permissive inference that the order is lawful when it relates to a military duty and a proper authority has issued it.<sup>78</sup> Such an approach is consistent with the general principles of criminal law that the government retains the burden of proof for all elements of a charged offense by a beyond a reasonable doubt standard,<sup>79</sup> and that this burden of proof with respect to elements never shifts to the defense.<sup>80</sup> Likewise, this approach is consistent with due process requirements<sup>81</sup> that permit the government to use permissive inferences to prove guilt, but disallow the use of rebuttable or irrebuttable presumptions for that purpose.<sup>82</sup> Moreover, the courts properly should treat the

<sup>68</sup> *Unger v. Ziemniak*, 27 M.J. 349 (C.M.A. 1989) (holding an order to a female officer to provide a urine sample under direct supervision not per se unlawful).

<sup>69</sup> 30 M.J. 682 (A.F.C.M.R. 1990).

<sup>70</sup> *Id.* at 683-84.

<sup>71</sup> *Id.* at 684.

<sup>72</sup> *Id.* at 683, 684.

<sup>73</sup> *Id.* at 683 n.8.

<sup>74</sup> *Id.* at 684. The girlfriend testified that she feared the accused might try to get even with her for her refusal to lie to investigators, and that she was relieved when the commander later placed the accused in pretrial confinement. She also testified, however, that she still loved the accused and continued to have sexual intercourse with him even after he received the order to avoid contact with her. *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* (citing MCM, 1984, Rules for Courts-Martial 801(g) and 905(e), and *United States v. Dumford*, 28 M.J. 836 (A.F.C.M.R. 1989)).

<sup>78</sup> MCM, 1984, Part IV, para. 14c(2)(a)(i). But see *United States v. Austin*, 27 M.J. 227, 231-32 (C.M.A. 1988) (military law presumes orders to be lawful, but the presumption is rebuttable); *United States v. Smith*, 45 C.M.R. 5 (C.M.A. 1972).

<sup>79</sup> See *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987) (urinalysis case); *United States v. Harper*, 22 M.J. 157 (C.M.A. 1987) (urinalysis case).

<sup>80</sup> See *United States v. Mance*, 26 M.J. 244 (C.M.A. 1988) (holding that the burden of proving the element of knowing possession in drug cases never shifts to the defense).

<sup>81</sup> See generally *Francis v. Franklin*, 471 U.S. 307 (1985); *Barnes v. United States*, 412 U.S. 837 (1973).

<sup>82</sup> See *United States v. Pasha*, 24 M.J. 87 (C.M.A. 1987).

question of an order's legality as a mixed issue of law and fact, and thus not solely within the province of the military judge.<sup>83</sup>

As to the legality of the order, the court in *Hawkins* first addressed whether the order furthered valid military purposes.<sup>84</sup> Military law traditionally has given expansive definition to the concepts of "military purposes" and "military duties."<sup>85</sup> The Manual for Courts-Martial speaks broadly in terms of accomplishing a military mission and promoting morale, discipline, or usefulness of the command.<sup>86</sup> In addressing these broad definitions, the court in *Hawkins* specifically noted that the commander designed the order to the accused to maintain good order and discipline within the accused's unit, protect the well-being of members of the unit, and prevent further obstruction of a military investigation.<sup>87</sup> Citing *United States v. Wine*,<sup>88</sup> the court concluded that the order clearly furthered military purposes and thus satisfied this prerequisite for lawfulness.<sup>89</sup>

The court next addressed whether the order at issue in *Hawkins* had the requisite specificity and certainty. Military law has long provided that for an order to be enforceable, it must be a clear and specific mandate to do or refrain from doing a particular act.<sup>90</sup> In the recent case of

*United States v. Womack*<sup>91</sup> the Court of Military Appeals addressed the specificity requirement in detail in connection with a "safe-sex" order. Tested against this precedent, the court in *Hawkins* concluded that the order limiting the accused's contacts with his victims and a witness was sufficiently "specific as to time and place and [was] definite and certain in describing the prohibited acts."<sup>92</sup>

The court also considered whether the order was overly-broad in scope or unnecessarily infringed upon the accused's personal rights.<sup>93</sup> On these questions, the court distinguished between the order issued in *Hawkins* and the less tightly drawn order given in *United States v. Wysong*.<sup>94</sup> The order at issue in *Wysong* directed the accused "not to talk to or speak with any of the men in the company concerned with this investigation except in the line of duty."<sup>95</sup> The Court of Military Appeals concluded that the order in *Wysong* was unenforceable, as it was vague, indefinite, and provided no exceptions.<sup>96</sup> The Air Force court observed that the order in *Hawkins* did not suffer from these defects, because the commander had limited it to prohibiting contact between the accused and three named individuals, and because it provided an exception for contacts arranged through the accused's counsel.<sup>97</sup> The court noted further that the order did not unduly restrict the accused's ability to prepare for his

<sup>83</sup> See *Unger v. Ziemniak*, 27 M.J. 349, 358-59 (C.M.A. 1989).

<sup>84</sup> *Hawkins*, 30 M.J. at 684.

<sup>85</sup> See generally Milhizer, *supra* note 66, at 6-8.

<sup>86</sup> See MCM, 1984, Part IV, para. 14c(2)(a)(iii):

[t]he order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs. However, the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order. Disobedience of an order which has for its sole object the attainment of some private end, or which is given the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article.

<sup>87</sup> *Hawkins*, 30 M.J. at 684.

<sup>88</sup> 28 M.J. 688 (A.F.C.M.R. 1989). For a critical discussion of *Wine*, see TJAGSA Practice Note, *An Order to "Disassociate" Held to Be Lawful*, *The Army Lawyer*, Aug. 1989, at 38.

<sup>89</sup> *Hawkins*, 30 M.J. at 684.

<sup>90</sup> See MCM, 1984, Part IV, paras. 14c(2)(c) and (d); *United States v. Beattie*, 17 M.J. 537 (A.C.M.R. 1983). Compare *United States v. Warren*, 13 M.J. 160 (C.M.A. 1982) (order to "settle down" was not a positive command) with *United States v. Mitchell*, 20 C.M.R. 295 (C.M.A. 1955) (order to "leave out of the orderly room" was a positive command).

<sup>91</sup> 29 M.J. 88 (C.M.A. 1989); accord *United States v. Dumford*, 30 M.J. 137 (C.M.A. 1990).

<sup>92</sup> *Hawkins*, 30 M.J. at 684-85.

<sup>93</sup> *Id.* at 685; see *Womack*, 29 M.J. at 90. See generally Milhizer, *supra* note 66, at 6-8. The court noted that even if the order infringed upon the accused's right to free speech, "it would meet the test of strict scrutiny required for such an order. Significant government interests were involved and the order was a necessary means to protect these interests." *Hawkins*, 30 M.J. at 685 (citing *Clark v. Community for Creative Non-violence*, 468 U.S. 288 (1984)). The court also noted that the order was not contrary to law or established regulations. *Hawkins*, 30 M.J. at 685 (citing *Womack*, 29 M.J. at 90, and MCM, 1984, Part IV, para. 14c(2)(a)(iv)); see also *United States v. Roach*, 29 M.J. 33 (C.M.A. 1989); *United States v. Green*, 22 M.J. 711 (A.C.M.R. 1986).

<sup>94</sup> 26 C.M.R. 29 (C.M.A. 1959).

<sup>95</sup> *Id.* at 30.

<sup>96</sup> *Id.* at 30-31. Indeed, the court wrote that had "the order been narrowly and tightly drawn and ... 'so worded as to make it specific, definite, and certain' it might well have been sufficient to support a conviction." *Id.* at 31 (citing *United States v. Milldebrandt*, 25 C.M.R. 139 (C.M.A. 1958)).

<sup>97</sup> *Hawkins*, 30 M.J. at 685.

defense by denying him the opportunity to participate in witness interviews with his counsel.<sup>98</sup>

As *Hawkins* and other recent cases indicate, the scope of conduct potentially subject to a lawful military order continues to be a topic of extreme importance. *Hawkins* provides valuable guidance for those seeking to craft lawful orders restricting the scope of contact between service members suspected of crimes and victims and witnesses of those crimes. *Hawkins* also raises interesting questions regarding the burden of proof in disobedience cases, the application of the waiver doctrine, and the use of inferences and presumptions to establish guilt. Major Milhizer.

### The Record of Trial Can Determine Success of Government Appeal

The government can appeal an adverse ruling by the military judge "which terminates the proceedings with respect to a charge or specification or which excludes evidence that is substantial proof of a fact material in the proceedings."<sup>99</sup> Initially, the government must take its appeal to a Court of Military Review where it receives priority review.<sup>100</sup> On a government appeal, the Court of Military Review "may act only with respect to matters of law."<sup>101</sup> The exception to this general rule is that military appellate courts may reverse clearly erroneous factual determinations.<sup>102</sup> In *United States v. Vangelisti*<sup>103</sup> the Court of Military Appeals stressed these statutory limits. The *Vangelisti* court also stressed the importance of creating factually and legally developed records prior to filing government appeals.

In *Vangelisti* the military judge suppressed the accused's confession. The trial judge held that the government had not established that the accused affirmatively waived the right to counsel.<sup>104</sup> After the military judge denied the government the opportunity to present additional evidence on the motion, the government appealed the military judge's ruling under Uniform Code of Military Justice article 62.<sup>105</sup> The government's position on appeal was that the military judge erred by not allowing the government to prove waiver through the "less-than-affirmative" waiver alternative described in Military Rule of Evidence 305(g)(2) and *United States v. Butler*.<sup>106</sup>

In an attempt to broaden their position, appellate counsel attached to the appellate brief affidavits from the Coast Guard Special Agents who interviewed the accused. These affidavits asserted that the agents properly advised the accused of his rights and that the accused expressly waived the right to counsel.<sup>107</sup>

The Coast Guard Court of Military Review reversed the military judge's ruling. The court held that Mil. R. Evid. 305(g)(2) does allow for "a demonstration of waiver not amounting to an affirmative declination of counsel."<sup>108</sup> As a result, the Coast Guard Court of Military Review held that the military judge had erred as a matter of law.<sup>109</sup>

On further appeal, the Court of Military Appeals reversed the Coast Guard Court of Military Review. The Court of Military Appeals emphasized several important concepts in the area of government appeals in reaching its decision.

<sup>98</sup> *Id.*; see *United States v. Strong*, 46 C.M.R. 199 (C.M.A. 1966); *United States v. Aycock*, 35 C.M.R. 130 (C.M.A. 1964)).

<sup>99</sup> UCMJ art. 62(a)(1). Note that the court-martial must satisfy other statutory requirements before the government may take advantage of this interlocutory appeal. For example, a military judge must be presiding at the court-martial and the convening authority must have empowered it to adjudge a punitive discharge. See UCMJ art. 62.

<sup>100</sup> UCMJ art. 62(b).

<sup>101</sup> *Id.*

<sup>102</sup> *United States v. Burris*, 21 M.J. 140 (C.M.A. 1985); *United States v. Clarke*, 23 M.J. 519 (A.F.C.M.R. 1986), *aff'd*, 23 M.J. 532 (C.M.A. 1987).

<sup>103</sup> 30 M.J. 234 (C.M.A. 1990).

<sup>104</sup> *Id.* at 235. See MCM, 1984, Mil. R. Evid. 305(g) [hereinafter Mil. R. Evid.].

<sup>105</sup> *Vangelisti*, 30 M.J. at 235.

<sup>106</sup> 441 U.S. 369 (1979) (holding that the trial court can establish a waiver of the right to counsel, without an affirmative waiver, through inferences from the accused's actions and words); Mil. R. Evid. 305(g)(2) (providing that "[i]f the right to counsel in subdivision (d) is applicable and the accused or suspect does not decline affirmatively the right to counsel, the prosecution must demonstrate by a preponderance of the evidence that the individual waived the right to counsel").

<sup>107</sup> *Vangelisti*, 30 M.J. at 236. In other words, the government effectively argued that the military judge erred by not allowing the government to prove an implied waiver, and that the judge should have permitted the government to reopen and prove expressed waiver. Rather than reopen, of course, the government should have made an offer of proof, or presented evidence which indicated, that expressed waiver existed. See *infra* text accompanying notes 112-14.

<sup>108</sup> *United States v. Vangelisti*, 29 M.J. 1059, 1062 (C.G.C.M.R. 1990).

<sup>109</sup> *Id.*



First, the Court of Military Appeals recognized that UCMJ article 62 limits the scope of appellate review to matters of law. As a result, when determining if the trial court erred as a matter of law (or made clearly erroneous factual findings), the Coast Guard Court of Military Review could consider only the facts of the case that the parties established at trial, on the record. The Coast Guard Court of Military Review erred, therefore, in considering the affidavits attached to the government's appellate brief.<sup>110</sup> In response to the government's argument that it offered the affidavits as evidence of harm suffered when the military judge would not allow the government to present additional evidence on the suppression motion, the Court of Military Appeals responded, "[o]rdinarily, appellate courts review claimed errors only on the basis of the error as presented to the lower courts."... This same principle should apply to government appeals."<sup>111</sup>

Accordingly, the first lesson counsel should learn from *Vangelisti* is that they must be prepared in the first instance to enter on the record all relevant facts pertaining to an issue before the military judge rules on that issue.<sup>112</sup> Military appellate courts will use facts only from the authenticated record of trial in determining if the military judge's determination was correct as a matter of law. If the government finds itself in the position of needing to reopen to present additional relevant evidence,<sup>113</sup> and the military judge is not allowing them to reopen, the trial counsel should, as a last resort, make an offer of proof as to what the government would present if allowed.<sup>114</sup>

*United States v. Vangelisti's* second teaching point derives from the Court of Military Appeals' analysis of whether the military judge erred by applying the wrong law to the facts presented.<sup>115</sup> Specifically, did the military judge understand and properly apply the counsel waiver provisions of Mil. R. Evid. 305(g)(1) and 305(g)(2)? The trial judge's ruling makes determining this question difficult. The Court of Military Appeals

wrote, "We agree with the Court of Military Review that the judge's ruling was not clearly worded.... In such a situation we are inclined to presume that the military judge knew the law and acted according to it."<sup>116</sup> Consequently the second lesson counsel should learn from *Vangelisti* is that ambiguous rulings will lead to presumptions. Counsel must always request that military judges make essential findings on their application and holding of all relevant legal theories. Because the *Vangelisti* trial counsel did not seek clear findings on the Mil. R. Evid. 305 issue of implied affirmative waiver, the appellate court was able to presume that the military judge knew and properly applied the law.

If the government hopes to be successful on a UCMJ article 62 appeal, the government must be prepared to offer, and must present, all relevant evidence at the trial level, because appellate courts will ordinarily consider only evidence that appears on record. Additionally, the government must ensure that the military judge makes specific factual and legal rulings. A government appeal can only be as successful as its record of trial allows. CPT Cuculic.

## Contract Law Note

### *Triax* Decision Clarifies Who Can Certify a Claim

The Contract Disputes Act of 1978 requires that "for claims of more than \$50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount request accurately reflects the contract adjustment for which the contractor believes the government is liable."<sup>117</sup> The Contract Disputes Act defines a contractor as "a party to a Government contract other than the Government."<sup>118</sup> The Federal Acquisition Regulation (FAR) states that if the contractor is an individual, that individual is the person who must certify.<sup>119</sup> The FAR also states that "if a contractor is not an individual, the certification shall be

<sup>110</sup> *Vangelisti*, 30 M.J. at 237.

<sup>111</sup> *Vangelisti*, 30 M.J. at 237 (quoting *United States v. Roberts*, 22 C.M.R. 112, 115 (1956)).

<sup>112</sup> Memorandum, United States Army Legal Services Agency, JALS-GA, 25 Apr 90, subject: Government Appeals Pursuant to Article 62, UCMJ, and R.C.M. 908.

<sup>113</sup> See *United States v. Tucker*, 20 M.J. 602 (N.M.C.M.R. 1985) (stating that military judges can grant motions for reconsideration after the government requests a 72-hour delay to consider filing an article 62 appeal in accordance with R.C.M. 908, and can allow the government to introduce additional evidence); see also *United States v. Scaff*, 29 M.J. 60 (C.M.A. 1989); *United States v. Griffith*, 27 M.J. 42 (C.M.A. 1988) (explaining the expanding role of military judges).

<sup>114</sup> See Mil. R. Evid. 103(a)(2). Presumably, the appellate courts could have considered the facts asserted in the government's affidavits in *Vangelisti* if the trial counsel had made an offer of proof at the trial level.

<sup>115</sup> Counsel should note that the Court of Military Appeals was displeased with the trial counsel's failing to read the defense suppression motion until after losing the motion. See *Vangelisti*, 30 M.J. at 240. As a result, the trial counsel belatedly conducted an analysis of which facts to present to the military judge.

<sup>116</sup> *Vangelisti*, 30 M.J. at 240.

<sup>117</sup> 41 U.S.C. § 605(c)(1) (1982).

<sup>118</sup> 41 U.S.C. § 601(4) (1982).

<sup>119</sup> Federal Acquisition Regulation 33.207(c)(1), 48 C.F.R. § 1 [hereinafter FAR].

executed by—(i) A senior company official in charge at the contractor's plant or location involved; or (ii) An officer or general partner of the contractor having overall responsibilities for the conduct of the contractor's affairs."<sup>120</sup>

In a recent case of *Triax Company v. United States*<sup>121</sup> the Claims Court further clarified who can certify a claim. Vacating an earlier decision in the same case,<sup>122</sup> the court held that the contractor's corporate secretary and attorney, as well as the vice president of financial affairs, could properly certify the claims.

In 1982, the Navy awarded the Triax Company a firm-fixed-price contract to renovate housing units at a Naval Air Station in Tennessee. During the preconstruction phase, the Navy informed Triax that numerous changes to the contract would be forthcoming. A dispute eventually arose over Triax's right to compensation for these changes, and in 1985 Triax sought an equitable adjustment of \$2,800,000 for cardinal changes to the contract. Mr. Carter, the secretary of the Triax Company and Triax's attorney, certified the claim. The contracting officer denied the claim and Triax appealed. In 1987, Triax submitted a second claim requesting \$4,100,000 for breach of warranty of the plans and specifications for the subject contract. Mr. Simmons, Triax's financial vice president, certified this second claim.

In *Triax I* the Claims Court, relying heavily on *Ball, Ball & Brosamer v. United States*,<sup>123</sup> dismissed the contractor's appeal for lack of subject matter jurisdiction. The court held that neither individual properly could certify a claim under the FAR on behalf of Triax. The court stated that proper certification is a prerequisite to the court's having subject matter jurisdiction. The court then ruled that Mr. Carter's certification was not valid because, although he was a senior company official, he was not in charge at the plant or worksite. The court deemed Mr. Simmons' certification of the second claim invalid because Mr. Simmons was neither a senior company official in charge at the plant or worksite, nor an officer of the company with direct overall responsibilities on the project.

On a motion for reconsideration in *Triax II*, Chief Judge Smith enunciated the two-part test for determining whether a contractor properly has certified a claim. The court also relied on *Ball* and earlier Claims Court decisions,<sup>124</sup> but reached a different conclusion than had the court in *Triax I*. According to the Claims Court, the first prong of this test requires that a certifying person fall into one of the two categories prescribed in FAR 33.207(c)(2), which provides regulatory guidance to non-individual contractors as to who may certify a claim. The second prong of the court-fashioned test is that the individual must have the actual authority to bind the contractor.

The *Triax II* court stated that the party alleging subject matter jurisdiction must prove the facts necessary to establish jurisdiction.<sup>125</sup> Once the party asserting jurisdiction has done this, the burden of proof shifts to the party challenging jurisdiction to show that jurisdiction is not proper.<sup>126</sup>

Judge Smith opined that the trial court erroneously interpreted the *Ball* case. The court found that authorities should not read the two categories of FAR subsection 33.207(c)(2) conjunctively, but should interpret them as optional factors, only one of which the party must meet.

The government argued that the certification of Mr. Carter, who was the corporate secretary and attorney for Triax, was defective. In *Triax I* the trial court found that, although Mr. Carter was clearly a senior company official, he was not in charge at the plant or worksite. The court in *Triax II* accepted this finding and agreed that Mr. Carter had not met the requirement of FAR subsection 33.207(c)(2)(i).

The Claims Court, however, found nothing in the record to indicate that the judge in *Triax I* had considered FAR subsection 33.207(c)(2)(ii), which concerns officers or general partners with overall responsibility for the company, when he held that the corporate secretary/attorney was not a proper certifying official. Under state law, Mr. Carter was the corporate secretary for Triax and, as such, was a general officer. The *Triax II* court held that the law presumes corporate officers to have overall

<sup>120</sup> FAR § 33.207(c)(2).

<sup>121</sup> *Triax Co. v. United States*, No. 626-85C (Cl. Ct. May 25, 1990) [hereinafter *Triax II*].

<sup>122</sup> *Triax Co. v. United States*, 17 Cl. Ct. 653 (1989) [hereinafter *Triax I*].

<sup>123</sup> 878 F.2d 1426 (Fed. Cir. 1989).

<sup>124</sup> See, e.g., *Al Johnson Constr. v. United States*, 19 Cl. Ct. 732 (1990); *Donald M. Drake Co. v. United States*, 12 Cl. Ct. 518 (1987); *Romala Corp. v. United States*, 12 Cl. Ct. 411 (1987).

<sup>125</sup> See *Stifel v. Hopkins*, 477 F.2d 1116 (6th Cir. 1973).

<sup>126</sup> See *Gregg v. Louisiana Power and Light*, 626 F.2d 1316 (5th Cir. 1980); *Messinger v. United Canso Oil and Gas*, 80 F.R.D. 730 (D. Conn. 1980).



responsibility for the contractor's affairs<sup>127</sup> as well as the authority to bind the contractor. The government offered no evidence to rebut this presumption.

The government instead argued that, for an individual to have overall responsibility, that person must have the authority to countermand every action taken by any other individual in the contractor's organization. The court pointed out the flaw in this argument with a hypothetical about two general partners, one of whom handled all administrative responsibilities while the other handled the practical aspects of production. The "production" partner's ordering cessation of operations at the worksite apparently would preclude FAR subsection 33.207(c)(2)(i) certification because, if the two partners were co-equal and the "administrative" partner could not countermand the "production" partner's order, then no certification of claims would be possible. The court held that the FAR drafters could not have intended such a result, but if they had, they could have easily required a "chief executive officer" to certify. The court noted that the government did not cite any cases in which a court held a corporate officer's certification to be invalid. On this basis, the *Triax II* court held that Mr. Carter's certification was valid.

The court also found that the judge in *Triax I* erroneously combined the requirements of subsections (c)(2)(i) and (c)(2)(ii) of FAR 33.207 by holding that the financial vice president of Triax, Mr. Simmons, was not a proper certifying official because he had no direct supervisory involvement with the project. In an accompanying affidavit,<sup>128</sup> Mr. Simmons stated that he had the same authority to act as the president of the company had, and that both he and Mr. Carter were authorized to complete the project following demobilization. Additionally, the court noted in dicta that since Triax had demobilized its operations in Tennessee by the time it filed its claim, Triax was quite reasonable in believing that no one existed who could meet the FAR subsection 33.207(c)(2)(i) requirement that the certifying official be a senior company official in charge at the plant or location involved.<sup>129</sup> Finding that Triax was operating under

this assumption, the court held that Triax's certifying under FAR subsection 33.207(c)(2)(ii) was appropriate. Therefore, the Claims Court found this certification to be valid since Mr. Simmons was a corporate officer of the corporation under FAR subsection 33.207(c)(2)(ii).

The *Triax II* decision provides several points that the government legal advisor must consider when challenging a contractor's certification. First, the Claims Court held that a plain reading of the FAR provides two separate categories of individuals who may properly certify claims. This interpretation of the FAR promotes the intent of Congress that at least one person (contractor) would be qualified to certify a claim.

Second, government counsel must always be aware that once the contractor makes a prima facie showing that a certification is valid, the burden shifts to the government to prove that the certification was improper. The legal advisor, therefore, must assess carefully the authority of the certifying official. Additionally, trial attorneys should, if necessary, fashion appropriate discovery requests to obtain information concerning the authority of a certifying official. The government must then produce evidence that the certification was invalid<sup>130</sup> because the certifying individual did not fall within the ambit of the FAR test. If the government cannot meet this burden, then it should not challenge the contractor's certification on this basis. Scott G. Gardiner.

### Legal Assistance Items

Faculty members of the Administrative and Civil Law Division, The Judge Advocate General's School, have prepared the following notes to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. Counsel also can adapt these notes for use as locally-published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; authors should send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

<sup>127</sup>The plaintiff suggested that the court should interpret FAR § 33.207(c)(2)(ii) to mean that an individual must be either an officer of the contractor or a general partner having overall responsibility for the conduct of the contractor's affairs. The court stated that while this was a plausible interpretation of the regulation, it did not have to rule on this issue to decide the case in favor of the plaintiff.

<sup>128</sup>The court brought into question the evidentiary value of Mr. Simmons' affidavit regarding his responsibilities, as well as those of Mr. Carter, because Triax submitted the affidavit after the dismissal of the claims in *Triax I*. In *Triax II* the Claims Court addressed how the court treated post-dismissal statements in *Al Johnson Constr. v. United States*. See *Al Johnson Constr.*, 19 Ct. Cl. at 732. In that case, the post-dismissal statements conflicted with other documents in the record, and were not particularly probative on the issue of whether the certifying official was "a senior company official in charge at the plant or location involved." The court had not seen any evidence that was inconsistent with Mr. Simmons' statements and felt that no reason existed to discount the statements.

<sup>129</sup>The court mentioned in a footnote that if the "plant or location involved" is no longer in operation, the court should interpret the corporate headquarters as being the "location involved" for FAR 33.207(c)(2)(i) purposes. Because of this interpretation, the argument arises that Simmons' certification could have passed muster under FAR 33.207(c)(2)(i) as well.

<sup>130</sup>McDonnell Aircraft Co., ASBCA No. 37346, 89-2 BCA ¶ 21,820.

## Estate Planning Note

### Court Reforms SGLI "By Law" Designation

The case of *Lanier v. Traub*,<sup>131</sup> heard before the United States District Court for the Southern District of Florida, presents yet another example of the problems associated with a "by law" designation of Serviceman's Group Life Insurance (SGLI). United States Army Sergeant Daniel Traub had used the "by law" designation for naming the beneficiaries of his SGLI policy. On the same day, Traub had completed a record of emergency data, DD Form 93, designating his mother and stepfather as fifty percent cobeneficiaries of all unpaid pay and allowances and of his death gratuity. The DD Form 93 also required in several places that Traub enter the name of his natural father; however, he instead entered his stepfather's name in those places.

After SGT Traub's death, his natural father and his stepfather both made claims for the SGLI proceeds. His natural father argued that the decedent's designation of "by law" was clear and unambiguous and not subject to collateral attack. The SGLI beneficiary form, which SGT Traub had filled out, clearly lists the order of payment when the soldier makes the "by law" designation. The natural father cautioned the court against looking beyond the form to find evidence of the decedent's intent and cited the strong public policy against using extrinsic evidence to rewrite contracts.

The court, however, refused to ignore the significance of a contrary designation on the DD Form 93. It cited an earlier case in which another court looked to the DD Form 93 to determine the actual intent of the decedent in making a "by law" designation.<sup>132</sup> According to the court, to ignore the plain expression of the decedent's intent on the DD Form 93 would be to allow the "decedent's clearly articulated 'will' to be trumped by formulaic technicality."<sup>133</sup>

Even if the court reached the right result, this case stands as another compelling example against making "by law" beneficiary designations. If the court was correct, a specific designation would have spared the parties the expense and inconvenience associated with litigating the issue. A more disturbing possible consequence of the "by law" designation is that the court incorrectly identified the intended beneficiary. MAJ Ingold.

## Tax Note

### Points Paid on Balloon Note Held Deductible in Year Paid

A recent opinion by the United States Court of Appeals for the Eighth Circuit revisited the rules relating to the deductibility of "points"<sup>134</sup> paid for refinancing a loan secured by a taxpayer's principal residence. In *Huntsman v. Commissioner of Internal Revenue*<sup>135</sup> the court reversed a Tax Court decision that held that points paid in refinancing a home mortgage loan were not entirely deductible in the year paid.

The Huntsmans originally had financed the purchase of their home in 1981 with a \$122,000 three-year secured loan with a "balloon"<sup>136</sup> payment. One year later, they obtained a \$22,000 home improvement loan secured by a second mortgage on their residence. In 1983, the Huntsmans obtained a new mortgage for \$148,000 and paid off the prior loans. The Huntsmans claimed a deduction on their 1983 federal income tax return for the \$4,440 in points they paid for the new permanent loan.

The issue in *Huntsman* related solely to whether the taxpayers were entitled to an immediate deduction for the points paid or whether they should have amortized the amount over the life of the loan. Internal Revenue Code (Code) section 461 sets forth the general rule regarding the deductibility of prepaid interest. It does not allow a taxpayer to deduct prepaid interest in the year paid;

<sup>131</sup> 734 F. Supp. 463 (S.D. Fla. 1990).

<sup>132</sup> *Prudential Ins. Co. of America v. Smith*, 762 F.2d 476 (4th Cir. 1985). In *Smith*, the court faced competing claims made by two women alleging to be the serviceman's widow. The first widow claimed that she was the lawful spouse and thereby entitled to the SGLI proceeds under the "by law" designation because an irregularity occurred in her divorce proceedings with the servicemember. The court referred to a DD Form 93 in which the serviceman listed his second spouse in the line calling for the name of his spouse. According to the court, this entry by the service member was evidence of the decedent's belief that she was his lawful wife and therefore the primary beneficiary of his SGLI policy as well.

<sup>133</sup> *Lanier*, 734 F. Supp. at 465.

<sup>134</sup> A "point" is one percent of the total value of a loan. Typically, a borrower pays "discount points" to a lender in consideration of the lender's charging lower interest rates. These points are deductible as prepaid interest. A borrower, however, also may have to pay "points" to a lender to cover nondeductible charges for specific services, such as loan origination fees, maximum loan charges, and premium charges. Lending institutions also use the term "points" to describe loan replacement fees that a seller may have to pay to the lender to arrange financing for the buyer. These "points," which are not connected to the interest rate charged by the lender, are not deductible; however, the taxpayer may claim such "points" as selling expenses to reduce the amount realized on the sale of a home.

<sup>135</sup> 58 U.S.L.W. 2746 (8th Cir. Jun. 14, 1990).

<sup>136</sup> Balloon financing refers to a loan in which the borrower makes regular payments of only the accrued interest, and then makes a final payment of the balance (normally the entire amount of the original principal) at the conclusion of a short term.

*State Taxation of Military Retired Pay*

rather, it requires the taxpayer to amortize the points paid over the life of the loan.<sup>137</sup> Section 461(g)(2) of the Code, however, creates an exception to the general rule that allows the immediate deduction of points paid in connection with a loan for the purchase or improvement of the taxpayer's primary residence.<sup>138</sup> To fall within that exception, the indebtedness must be secured by the taxpayer's principal residence and the payment of points must be an established business practice in the area.<sup>139</sup>

The Commissioner of Internal Revenue (Commissioner) sent a deficiency notice to the Huntsmans claiming that section 461(g)(2) does not apply to points paid for refinancing home loan indebtedness. In upholding the Commissioner's determination, the Tax Court adopted the position that Congress intended to restrict Section 461 to cases involving the initial purchase of a home.

The Eighth Circuit, however, disagreed with the Tax Court's interpretation, concluding that the Internal Revenue Service (IRS) should have construed section 461 broadly. The *Huntsman* court noted that section 461 merely requires a taxpayer's debt to be "in connection with" the purchase or improvement of the primary residence. It does not require that the indebtedness be directly related to the purchase of the taxpayer's primary residence.

The court held that a permanent loan, which a taxpayer takes out to replace short-term loans used for the purchase of his primary residence, is connected sufficiently to the purchase of the home to fall within section 461(g)(2). According to the court, the Huntsman's refinancing was an integrated step in connection with the purchase of the home and, therefore, the points should have been entirely deductible in the year paid.

Although many taxpayers may be able to rely on *Huntsman* to generate tax savings, the impact of the case may not be that great. Even if the facts of a particular case fall squarely within the holding of *Huntsman*, only taxpayers residing in the Eighth Circuit area can rest assured of obtaining the same result. Moreover, the court in *Huntsman* implied that it might have reached a different result if the taxpayer had refinanced the existing debt to obtain the benefit of lower interest rates or to achieve some other financial goal. MAJ Ingold.

With the coming force reduction in the military, many soldiers will be retiring earlier than planned. Consequently, legal assistance attorneys can anticipate an increased number of retiree clients who are eligible for legal assistance under the provisions of the Army Legal Assistance Program.<sup>140</sup> These clients often will have questions about the ability of a particular state to tax their retirement income. The United States Supreme Court answered some of these questions last year in *Davis v. Michigan*.<sup>141</sup> State courts, however, still must review other issues, such as the retroactivity of *Davis*, on a state-by-state basis. The following note alerts legal assistance attorneys to some of the concerns of their retiree clients and provides information on the approach various states take in taxing military retired pay.

In *Davis v. Michigan* the Supreme Court struck down tax schemes in which states taxed the income of persons retired from service with the federal government at rates higher than the rates set for income of retirees from state service. The Court held that this practice violated the constitutional doctrine of intergovernmental immunity.

Following *Davis*, retirees from federal service, including military retirees, have hotly contested the retroactivity of the Supreme Court's decision. At stake are millions of dollars in state tax revenues in those states that previously treated federal retirement income in an inequitable manner. Although retirees received a favorable appellate court decision in Missouri,<sup>142</sup> many state courts likely will be inclined to hold that federal retirees should not receive refunds of taxes assessed improperly in past years.

Practitioners will find a good example of the approach state courts may take in determining the retroactivity of the *Davis* decision in *Bass v. South Carolina*,<sup>143</sup> decided by the South Carolina Supreme Court on May 23, 1990. Before *Davis*, South Carolina law allowed federal retirees a \$3,000 exemption of retirement income. On the other hand, South Carolina allowed state employees a total exemption of their retired income. Following *Davis*, the South Carolina legislature amended the tax laws to comply with the Supreme Court's decision. Federal

<sup>137</sup> See I.R.C. § 461 (West Supp. 1989).

<sup>138</sup> I.R.C. § 461(g)(2) (West Supp. 1989).

<sup>139</sup> *Id.*

<sup>140</sup> Army Reg. 27-3, Legal Services: Legal Assistance, para. 2-4a(5) (10 Mar. 1989).

<sup>141</sup> 57 U.S.L.W. 4389 (U.S. Mar. 28, 1989).

<sup>142</sup> See *Hackman v. Missouri*, 771 S.W.2d 77 (Mo. 1989) (construing the Missouri tax refund statute as mandating a tax refund when the statutory scheme is unconstitutional).

<sup>143</sup> No. 23,216 (S.C. May 23, 1990).

retirees then sought refund of taxes they previously had paid.

Although South Carolina law requires refund of taxes erroneously assessed, the South Carolina Supreme Court found that law inapplicable to the federal retirees. The *Bass* court used the three-prong test of *Chevron Oil Co. v. Huson*<sup>144</sup> to decide whether *Davis* should apply retroactively. The court determined that the *Davis* case satisfied the first prong of *Chevron* because *Davis* had invalidated past precedent and established a new principle of law. Under the second prong, the court concluded that the state had no reason to believe it was unconstitutionally collecting the taxes from federal retirees. Finally, under the third prong of *Davis*, the court weighed the equities involved and determined that the burden to the state posed by a liability of approximately \$200,000,000 in refunds outweighed the benefit that the retirees would gain from a refund.

While the *Bass* court's analysis and its application of *Davis* are questionable, the court's concern with the state's financial well-being is clearly evident. This same concern with state financial constraints will likely

influence other state courts faced with refund demands. The vitality of many of the refund cases depends on whether a state's statute of limitations is applicable and, if so, whether it has run. During the first half of 1990, Alabama, Arizona, Kansas, Louisiana, Missouri, Oregon, South Carolina, Virginia, and Wisconsin all had ongoing litigation concerning the retroactivity of *Davis*.<sup>145</sup>

Legal assistance attorneys should keep a list of those states that either have no income tax or grant tax exemptions for military retired pay. States in the former category are Alaska, Connecticut, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington, and Wyoming. States that exempt all military retired pay from taxation are Hawaii, Illinois, Louisiana, Michigan, Montana, New Mexico, New York, and Pennsylvania.<sup>146</sup> The following states and territories exempt disability retired pay from state taxation, although all other pay is taxable: Alabama, Arizona, California, District of Columbia, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, North Dakota, Oregon, Puerto Rico, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin.<sup>147</sup> MAJ Pottorff.

<sup>144</sup>404 U.S. 97 (1971).

<sup>145</sup>*Davis v. Michigan: State-by-State Listing*, The Retired Officer (Feb. 1990).

<sup>146</sup>*State Income Tax Information on Military Retired Pay*, The Retired Officer (Feb. 1990).

<sup>147</sup>*Id.*

## Claims Report

United States Army Claims Service

### The Lifecycle of a NATO SOFA Claim

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It's the end of a long day during REFORGER exercises for the crew of an M1 Abrams tanks.<sup>1</sup> Traveling on a small concrete farm road, approaching a small bridge, the tank commander sees a traffic warning sign. Unfortunately, not having paid much attention to the instruction on international road signs and traffic rules which his unit received prior to deploying, the tank commander directs the driver of the tank to proceed across the bridge. As the tank starts across the bridge, the structure begins to "bow down" in the middle, but the crew reacts quickly.

The driver immediately throws the transmission into reverse, and instead of a tank and its crew plunging into a

small river, the tank backs off the bridge before it collapses. The bridge, with a load limit of just under seven tons, as indicated by the sign, is no longer serviceable. This results in a severe economic blow to the local farmers because the bridge is the only tractor crossing point for several kilometers in either direction, and harvest time is fast approaching. Several NATO SOFA claims are born.

What is a NATO SOFA claim? Those few mysterious souls who know the claims game know that a NATO SOFA claim is a claim filed under the provisions of Article VIII of the NATO Status of Forces Agreement

<sup>1</sup>REFORGER is Return of Forces to Germany, normally an annual exercise in which U.S. armed forces from CONUS deploy to the Federal Republic of Germany (FRG) for maneuvers with U.S. and allied forces stationed in the European theater.

(SOFA).<sup>2</sup> Article VIII is the authority under which claimants can file for tort or maneuver damages caused by the forces of a NATO sending state while operating in a NATO host nation's territory.<sup>3</sup> The operative provision to a NATO SOFA claim is paragraph 5 of article VIII, which begins as follows:

Claims (other than contractual claims and those to which paragraphs 6 and 7 of this Article apply) arising out of acts or omissions of members of a force or civilian component done in the performance of official duty, or out of any other act, omission or occurrence for which a force or civilian component is legally responsible, and causing damage in the territory of the receiving State to third parties, other than any of the Contracting parties, shall be dealt with in accordance with the following provisions.<sup>4</sup>

Several points regarding paragraph 5 of article VIII require attention. First, claims arising out of contract cannot be processed through NATO SOFA claims procedures. Second, paragraphs 6 and 7 except two categories of claims from the NATO SOFA claims procedure. Paragraph 6 excepts tort claims arising from incidents caused by members of the force or the civilian component while they were acting outside the scope of official duties. Paragraph 7 excepts claims arising from incidents involving the unauthorized use of motor vehicles belonging to the armed forces of a Sending State except where the force would be legally responsible.<sup>5</sup> Third, acts by dependents, unless they fit within the definition of civilian component, generally civil service employees, are not processed under the NATO SOFA claims system.<sup>6</sup>

Article VIII of the NATO SOFA contemplates two principle types of claims by third parties. The first is the

"scope claim" under paragraph 5. The second is the "nonscope claim" under paragraph 6. A "scope claim" is a claim resulting from an incident caused by a member of the force while that person is acting within the scope of his or her official duties. "Non-scope" claims, processed by a United States foreign claims commission, involve torts committed by soldiers outside of the scope of their official duties. Examples of "non-scope" claims include assaults, vandalism, and thefts by soldiers resulting in personal injury, property damage, or property loss.

Unlike the familiar claims for damage or loss to a soldier's household goods, NATO SOFA claims often take a great deal of time to process. Maneuver damage claims, often amounting to hundreds of thousands of dollars per claim, can take anywhere from six to twenty-four months to complete. Much depends on the complexity of the case. Simple maneuver damage claims, such as one stemming from a road sign run over by a tank, are easy to verify and quantify. Normally, in such cases, units will report the damage, providing U.S. Army Claims Service, Europe (USACSEUR) with easy identification as to the United States' involvement and allowing quick certification of the claim.<sup>7</sup> Since costs of road signs are relatively easy to quantify, USACSEUR personnel can evaluate and settle the claim quickly. Other claims, such as those involving five kilometers of concrete farm roads damaged by tracked vehicles, or the damaged bridge described above, can take much longer.<sup>8</sup> Complex cases require extensive investigation as to who caused the damage (if no unit or nation is identified), and as to how much of the damage is attributable to U.S. forces, other forces, or commercial traffic. Negotiations often take place during and after joint on-site inspections by United States and German officials.

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<sup>2</sup>Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 [hereinafter NATO Status of Forces Agreement].

<sup>3</sup>The term "Contracting Party" generally means a country that is a signatory to the SOFA. A "Receiving State" is a Contracting Party that has forces from another Contracting Party stationed within its territorial boundaries. The Contracting Party with forces stationed in another Contracting Party's territory is called a "Sending State."

<sup>4</sup>Article VIII, paragraph 5, NATO Status of Forces Agreement. Paragraph 5 goes on to define the parameters under which a party may initiate a claim. The law of the nation in which forces are stationed controls in adjudicating tort liability claims. A Sending State's forces are subject to the same extent of liability as would be the forces of the Receiving State in an identical factual situation.

<sup>5</sup>USACSEUR generally will handle claims stemming from unauthorized motor vehicle use under the "non-scope" provisions of paragraph 6. An example of this is when a soldier takes his unit CUCV and goes partying at a local pub and subsequently is involved in an accident.

<sup>6</sup>Dependents, as defined in article I, NATO Status of Forces Agreement, are not mentioned in paragraph 5, Article VIII. The paragraph specifies that claims can result only from acts or omissions of the members of the forces or the civilian component.

<sup>7</sup>Certification is the culmination of the investigative process by which USACSEUR determines the nature of U.S. forces' involvement in an incident giving rise to a claim. A positive or "scope" certificate indicates that USACSEUR acknowledges that U.S. forces were involved in the incident.

<sup>8</sup>USACSEUR can handle some very minor damage claims using an expeditious system of processing known as "simplified procedures." Under paragraphs 38a and 44 of the Administrative Agreement Between the United States and the FRG [hereinafter referred to as the Administrative Agreement], German finance authorities may investigate, and settle independently, tort claims of up to 1,500 deutschemark and maneuver damage claims of up to 3,000 deutschemark. German finance authorities may do this without prior coordination with U.S. authorities. The United States, however, remains responsible to reimburse the FRG for its share of the claim.

Let's follow the NATO SOFA claims process using our example of the M1 tank crew on the farm road and bridge.<sup>9</sup> The accident took place at 1600 on 15 September 1988, near the community of Ansbach, Federal Republic of Germany (FRG). Shortly after damaging the bridge, the unit notified the military police, who subsequently notified the German police. The German police arrived on the scene at approximately 1630, as did the MPs. Everyone who witnessed the accident remained at the scene and provided statements. These witnesses included two farmers who owned nearby property and the foreman of a local road construction crew, who certified that the bridge was unsafe for anything heavier than a bicycle. The local fire department assisted the police in securing the area. The farmers were particularly upset because they were harvesting their potato and sugar beet crops, and the bridge was the only crossing point for ten miles in either direction. They alleged that transporting their crops to market now will be extremely costly for them, particularly in terms of travel time and inconvenience. Furthermore, they noticed that the column of vehicles also caused cracks on the concrete farm roads. Someone will have to pay! The foreman of the construction crew mentioned that a new bridge will have to be built, and the local government does not currently have funds for such construction.

USACSEUR's NATO SOFA Claims Branch will handle the claims for the United States. USACSEUR acts in concert with the thirty-seven separate German Defense Costs Offices (DCO) in processing NATO SOFA claims. Under the German law implementing the NATO SOFA claims provisions, individual claimants have three months from the date of discovery of the damage to file a claim with the DCO. If a claimant does not file within the three-month time period, the statute of limitations provisions of the NATO SOFA will forever bar him from filing a claim. Most potential claimants, after years of allied maneuvers in the FRG, are very familiar with the statute of limitations rules. The USACSEUR and DCO, however, seldom will deny claim for failure to meet this time limitation.

Have you figured out who the claimants are in this situation? The farmers are potential claimants: they now have to use additional gasoline and different equipment to haul harvested crops in the short term. The farmers may never harvest some of their crops because of the additional time required to transport crops over the

longer route. The local community is a claimant: someone must repair the damage to its bridge and concrete roads. The fire department is a claimant too: it had to render its services to secure the area.

For the purpose of this article, we will concentrate on the community claim for the bridge and the concrete farm roads. Assuming that the community filed its claim with the DCO by November 15, 1988, the claim is timely. When the claimant, whether a private individual or a governmental agency, files with the DCO, the DCO prepares a form known as a "notice of claim." The most important items on this form include the name of the claimant, address of the claimant, description of damage suffered, and the amount of money claimed. The DCO forwards this form to the NATO SOFA Claims Branch, USACSEUR, for investigation and certification.<sup>10</sup>

Prior to forwarding the file to USACSEUR, the DCO conducts a limited investigation to help USACSEUR initiate its certification investigation. Generally, the DCO's investigation involves gathering as much information as possible from the claimant about the circumstances involved in the incident. The DCO caseworker often will have the claimant provide information substantiating the amount claimed. The community, in claiming the bridge damage and the concrete road damage, may provide expert opinions substantiating costs of replacing or repairing the bridge and panels of concrete roads. Expert fees incurred also are claimable. DCOs will continue to work with USACSEUR personnel even after they forward the notice of claim and associated documents to USACSEUR.

The DCO caseworker will make no adjudication at this time. Only after the investigation at the DCO has progressed to the point at which it can identify a particular U.S. force (e.g., Army, Navy, Marines), and the DCO has compiled sufficient information for USACSEUR to complete the investigation, will the DCO forward the file to USACSEUR for certification.<sup>11</sup>

Upon receipt of the notice of claims, along with various documents obtained by the DCO, the NATO SOFA Branch, Maneuver Section, files the claim and gives it a NATO SOFA claim number. The mission of the NATO SOFA Claims Branch is to investigate and determine whether U.S. forces were either directly involved in the incident giving rise to the claim or were, in some way, legally responsible under German law for the

<sup>9</sup>A similar incident occurred during REFORGER 1988.

<sup>10</sup>The DCO is not required to send notices of claims to USACSEUR on simplified claims. See *supra* note 8 and accompanying text.

<sup>11</sup>Department of Defense Directive 5515.8, Single Service Assignment of Responsibility for Processing of Claims (Nov. 14, 1974). The Department of Defense has assigned responsibility for settlement of claims to the Department of the Army for Belgium, France, and the Federal Republic of Germany.



incident giving rise to the claim. If the USACSEUR investigation indicates United States involvement or legal responsibility, then USACSEUR must issue what is known as a positive or "scope" certificate.

Certification is the single most critical point in the NATO SOFA claims process for USACSEUR. It is the only control that the United States has on resolution of the claim. Once USACSEUR has the claim file, it forwards requests for information, either by mail or by telephone, to German polizei units, American military police stations or to U.S. units believed to be involved in the incident. Information obtained and evaluated in conjunction with information gained from the DCO, provides the basis for the USACSEUR certification decision.

USACSEUR can resolve the certification decision in various ways. The four most common certification decisions are to certify the claim as "scope," "scope-exceptional," "not-involved," or "non-scope." A scope certification decision sent to the DCO authorizes the DCO to complete its investigation, adjudicate the claim, and offer a final settlement to the claimant. Once the claimant accepts the settlement offer, the DCO pays the claimant 100% of the value of the claim from FRG funds. The DCO then sends USACSEUR a bill for the United State's share of the settlement, which is normally seventy-five percent of the value of the claim. In a "scope" certification, once USACSEUR forwards the certificate to the DCO, USACSEUR will take no further action until it receives the bill for the United States' share.

Paragraph 9 of the Administrative Agreement authorizes "scope exceptional" certifications. Whenever the facts indicate the possibility of an exaggerated or fraudulent claim, or the claimant fails to claim a sum certain or claims an extremely high amount, USACSEUR will declare the claim to be exceptional. This procedure allows USACSEUR the opportunity to review and comment on the entire DCO file and adjudication decision prior to the final payment of the claim by the DCO. USACSEUR comments are limited to a statement of approval or disapproval. The Administrative Agreement does not bind the DCO to follow the USACSEUR position. Furthermore, the DCO can, for all practical purposes, provide the claimant with advance payments on the claim settlement up to the amount of the final adjudicated settlement. The exceptional procedure allows USACSEUR the opportunity to closely review claims

adjudications by the DCO, and gain time to inspect maneuver damage sites prior to final payment, but not much more.

The "not-involved" statement is a considerably more powerful tool in the SOFA claims process. If the USACSEUR investigation does not reveal evidence substantiating United States involvement, issuing a "not-involved" statement prohibits the DCO from further action on the claim.<sup>12</sup> The DCO then may not adjudicate the claim without a "scope" certificate. The DCO can continue to investigate the claim, and the claimant, through the DCO, can submit additional evidence to USACSEUR for reconsideration, but the "not-involved" statement effectively "kills" the claims process. Although the claimant can resort to litigation through the German court system to force the FRG to provide redress upon denial of a SOFA claim, the DCO will represent the interests of the United States in this litigation. Consequently, the United States is never a party to this procedure. Generally, in cases in which the German court finds in favor of the claimant on the issue of involvement of U.S. forces, USACSEUR will reconsider the claim in light of the court's decision. However, the court decision will not require USACSEUR to change its certification decision.

USACSEUR will issue a "non-scope" certificate only in circumstances in which a soldier or member of the civilian component is involved in an incident outside of the scope of official duties. In these cases, the Commissions Branch, USACSEUR, investigates, adjudicates and settles the claim. USACSEUR then makes full settlement payment from U.S. funds. "Not-involved" and "non-scope" provisions do not apply to our scenario.

Historically, the claim for damage to the bridge and to the concrete roads have proven to be costly. Concrete roads, in particular, have proven to be troublesome to USACSEUR. Not only do communities and individuals claim for totally destroyed panels of concrete roads, but also for panels which, although appearing to be totally serviceable, exhibit cracks of varying degree in them. Costs of repair on these roads can run as high as 100 deutschmark per running meter.<sup>13</sup> Discerning between old preexisting cracks and new ones is extremely difficult, even for engineering experts. Likewise, engineers often experience more difficulty in telling the difference between a crack caused by a military vehicle and one caused by an agricultural or commercial vehicle. This is a situation in which USACSEUR normally will issue the "scope exceptional" certificate.

<sup>12</sup> Administrative Agreement, paragraph 10, amended 11 July 1989. The Administrative Agreement supplements article VIII, NATO SOFA, and article 41, Supplemental Agreement, and sets forth the step-by-step procedures followed in processing NATO SOFA claims.

<sup>13</sup> For example, a "damaged, but not destroyed" concrete road panel has a repair cost of between DM 25 to DM 45 per running meter, depending upon where (in the FRG) it is located and the quality of construction. For the same reasons, replacement of "destroyed" panels can cost up to DM 100 per running meter.

Often, as part of either the certification process or as part of the USACSEUR review of DCO actions on a "scope-exceptional" claim, USACSEUR personnel will conduct an on-site inspection of the damage site.<sup>14</sup> On-site inspections happen particularly often in maneuver damage claims situations. USACSEUR personnel will accompany DCO personnel on their adjudication visits to maneuver damage sites. Participation in these inspections gives USACSEUR the ability to have input into the final settlement of high-value claims. The prerogative to participate in these inspections, and provide input in the settlement procedures, is one of the major reasons for the lengthy processing period for such claims.<sup>15</sup>

The NATO SOFA claims process is complicated, involved, and often time-consuming. The simplified procedures, involving a significant percentage of low-value maneuver damage claims, allow for quick settlement of a large number of claims, but the normal procedure often causes claimants to wait many months for final settlement of their claims. However, USACSEUR must perform the process of investigation, for both certification and adjudication, in a thorough manner. The annual budgets for the settlement of U.S. NATO SOFA claims during the past few years have exceeded thirty million dollars. Likewise, the financial obligations of the FRG under the system are also extensive. For the process to last up to twenty-four months in major exercise claims is not unusual. If the United States reduces its maneuver activity, you can expect that maneuver claims will, likewise, decline. However, as long as U.S. forces continue to have a significant presence in the FRG, the NATO SOFA Claims Branch, USACSEUR will continue to process NATO SOFA claims. In the community's claim, our on-site inspection verified the claimed damages, and the parties reached a just settlement. As a result of this process, the United States maintains goodwill with both the host nation and its private citizens.

## Claims Notes

### Personnel Claims Notes

#### *Forwarding DD FORM 1840R to the Destination Transportation Office*

USARCS, in conjunction with the Military Traffic Management Command (MTMC) and the other military claims services, is in the process of revising DD Form 1840R to require the claimant to state the estimated value of his or her loss. The present carrier evaluation systems use the estimate of loss and damage the claimant lists on DD Form 1840. Unfortunately, most claimants are not aware of all their loss and damage at delivery. Having

claimants estimate loss and damage on DD Form 1840R and dispatching this form to the destination Personal Property Shipping Office (PPSO) will result in greatly improved carrier evaluations and better carrier performance.

Accordingly, for any DD Form 1840R received after 1 September 1990, claims personnel will have the claimant estimate the *total* value of his or her loss and damage (including the value of any loss or damage on the DD Form 1840 at delivery) on the DD Form 1840R. If the claimant presents a claim at the same time he or she turns in the DD Form 1840R, the claimant's estimate of loss or damage should be the amount claimed on the DD Form 1842. Claims personnel will then forward a copy of the DD Form 1840R to the destination PPSO. (The destination PPSO will, in turn, forward the form to the origin PPSO, which actually will use it to score the carrier. As indicated on the form, claims personnel may forward the DD Form 1840R directly to the origin PPSO and should consider doing so if this will not involve too much additional work).

The claims office still will dispatch the original 1840R to the carrier listed in block 9 of the DD Form 1840, and the claims office will still retain a second copy.

Many claimants will not have received the revised DD Form 1840R by 1 September 1990. If claims personnel receive an older version of DD Form 1840R on or after 1 September 1990, instruct the claimant to write on the last line of Block 2 (List of Property Loss/Damage) the following: "I estimate the total value to my loss/damage to be \$\_\_\_\_\_." Have the claimant initial this statement, then forward a copy to the origin or destination PPSO.

If the claimant later amends his DD Form 1840R to add additional items, the claims office need *not* dispatch an amended estimate of loss or damage to the PPSO; the administrative burden of attempting to keep track of a succession of DD Form 1840R would far outweigh the value of the revised information.

To make this system work, claims personnel *must* screen each DD Form 1840R received, which paragraph 2-55b(5), DA Pamphlet 27-162, already requires. While we understand that this requirement imposes an additional workload on many claims offices that already are understaffed, the benefits we ultimately will receive from improving the carrier evaluation system will help the claims system in the long run. Mr. Frezza.

### Quarters Fires

Claims judge advocates must view claims incidents from the perspective of *all* of the chapters in AR 27-20,

<sup>14</sup> As a result of an investigation by the General Accounting Office (GAO) during 1987 and 1988 into the verification of maneuver damage in the FRG, USACSEUR obtained five additional positions in the NATO SOFA Branch. These personnel conduct investigations of high-value and suspect maneuver damage claims. In addition, four other adjudicator positions exist, including one stationed at each corps headquarters, and one civil engineer position.

<sup>15</sup> Both the DCOs and USACSEUR are limited in terms of personnel available to inspect the hundreds of major claims generated by major exercises.



even when a Chapter 11 emergency partial payment to an active duty soldier might seem justified.

When a fire that started in a soldier's government quarters destroys his or her property, prior to meeting the needs of the family by making an emergency partial payment from claims funds under the Personnel Claims Act, claims personnel must determine whether preliminary indications indicate that the quarters occupant, or the occupant's family members or agents, may have caused the fire. While claims personnel naturally wish to alleviate hardship in these situations, the law may not entitle the member to any payment on such a claim, and the government actually may hold the member pecuniarily liable for damage to the quarters. The prohibition against paying claims for property that a claimant loses or damages, due to his or her own negligence, is statutory;<sup>1</sup> paying such claims creates an Anti-Deficiency Act violation. Thus, until an investigation is complete, an emergency partial payment to a soldier who had a fire start in his or her quarters is almost always inappropriate—paragraph 11-17a, AR 27-20, only authorizes an emergency partial payment if the claim is *clearly* payable, in an amount exceeding the proposed emergency partial payment.

Avoiding the disbursement of an inappropriate emergency partial payment becomes even more crucial when personal injuries or deaths result from the fire and claimants potentially could file claims against the United States under the Military Claims Act or the Federal Tort Claims Act; in such instances, claims personnel can resolve the question of negligence and whether an emergency partial payment is allowable only by consulting with the overseas command claims service or the Tort Claims Division area action officer (AAO) at U.S. Army Claims Service—who may, in turn, have to consult with the Department of Justice or higher authority within DA.<sup>2</sup> Note, however, that these restrictions would not limit payment under the Personnel Claims Act in instances in which a fire spreads from where it initially started and destroys property belonging to other occupants of a multifamily building, provided the other occupants were not negligent.

Whenever a quarters fire occurs, claims personnel should investigate the scene immediately to determine what items the claimant should salvage;<sup>3</sup> and to note the general nature of the property the claimant owned to avoid problems with substantiation.

If possible, claims personnel should photograph the scene. The claims judge advocate should then obtain the evidence necessary to determine independently whether the claimant's negligence caused the fire. In making this determination, the claims judge advocate is *not* bound by

the report of survey, which an officer without expertise in determining the cause of fires usually has produced. The fire marshal's assessment and the CID report are the best sources of evidence. However, these reports are not designed for claims purposes and are usually not adequate if serious injury or death has occurred; in such instances, claims personnel should contact the USARCS AAO or the command claims service to determine whether he or she should hire an outside expert.

The Personnel Claims Act is not a disaster relief statute and is not the only source of assistance available in these situations. In appropriate instances, claims personnel can assist soldiers by steering them to other agencies that can help, such as Army Emergency Relief, the Red Cross, Army Community Service, or the installation chaplain's office. Some of these agencies can give grants or loans for immediate necessities. Once a claims examiner has determined that payment under the Personnel Claims Act is proper, he or she can make emergency partial payment so that the claimant can repay these loans. Mr. Frezza.

#### Personnel Claims Recovery Note

##### *Favorable Comptroller General Decision on Checking Off Items at Delivery and Depreciation During Periods of Nontemporary Storage*

In a recent decision, the Comptroller General overruled the General Accounting Office (GAO) General Government Division Claims Group and upheld the Army's position in holding carriers liable for missing items that a claimant timely reported on DD Form 1840R, even when the carrier's inventory shows the item as being "checked off" at delivery, and in not depreciating items during periods of nontemporary storage.

The Army offset a claim against National Forwarding Company, Incorporated (National Forwarding), the Army assessed it liable for a missing Schwinn bicycle which allegedly was checked off the inventory at delivery. The Army also did not allow National Forwarding to deduct depreciation for items placed in nontemporary storage. The company appealed the offset to the GAO. On 4 December 1989, the GAO issued Settlement Certificate Z-2862672-6 in favor of National Forwarding on these two issues.

The GAO accepted National Forwarding's denial of liability for the bicycle that the claimant noted as missing on DD Form 1840R because the bicycle allegedly was checked off the inventory at delivery. It also disallowed the Army's policy of not deducting depreciation when calculating carrier liability for periods of nontemporary

<sup>1</sup>See 31 U.S.C. § 3721f(3) (1988); Dep't of Army Pam. 27-162, Legal Services: Claims, Appendix D (15 Dec. 1989).

<sup>2</sup>See Army Reg. 27-20, Legal Services: Claims, para. 11-2d(2) (28 Feb. 1990).

<sup>3</sup>See Restoration Handbook, MTMC (Mar. 1988) (providing guidance on determining salvage).

storage. Even though GAO Settlement Certificates only apply to the case at hand and have no precedent setting value, many claims offices were inundated with copies of this Settlement Certificate from carriers denying liability on these issues.

In February 1990, the United States Army Claims Service appealed the GAO Claims Group Settlement Certificate to the Office of the Comptroller General. The Army argued that the "Joint Military-Industry Memorandum of Understanding on Loss and Damage Rules," specifically allows for loss noted after delivery if the claimant timely noted such a loss on a DD Form 1840R and the loss is substantiated. These were the facts in this case. The Army contended that carrier personnel may simply check off items on an inventory after leaving the shipper's home. Carrier personnel often do this to avoid chargebacks against the driver or agent. On the issue of nondepreciation for periods of nontemporary storage, the Army contended that the carrier industry is well aware that this is the policy and regulation of all the military services. When carriers accept contracts for shipment of household goods they are acknowledging and agreeing to this potential liability.

On 22 June 1990, the Comptroller General issued Comptroller General Decision-B-238928 in the matter of National Forwarding Company, Incorporated. In this decision, the Comptroller General completely reversed the GAO's Claims Group Settlement Certificate and upheld the Army position.

The Comptroller General held that National Forwarding was liable for the missing bicycle even though the delivery form had a check next to the item. The Com-

troller General held that no evidence supported the proposition that the military member, as opposed to the driver for example, was the one who annotated this form. The Comptroller General also upheld the rule of the Military-Industry Agreement that proper postdelivery notice to the carrier overcomes the correctness of the delivery receipt.

On the issue of computing carrier liability for long periods of storage, the Comptroller General found the Military Services were correct in not allowing deductions for depreciation during this storage period.

This Comptroller General decision is very good news. It should reduce denials from carriers on issues of missing items allegedly checked off the inventory at delivery, and questions of assessing depreciation for items in nontemporary storage. Comptroller General Decisions are precedent setting and claims personnel legally can cite to them to defend Army positions. They remain the law unless overturned by a statute or a future Comptroller General decision. Ms. Schultz.

#### Management Note

#### Model Claims Office Reports

Army claims offices included in the Model Claims Office Program are reminded that FY90 reports are due at USARCS or the command claims services in Europe and Korea by 15 November 1990.<sup>4</sup> Any office needing another copy of the report form (which can be reproduced locally) should contact Ms. Brenda Boddy (Autovon: 923-2051/4469; Commercial: (301) 677-2051/4469). COL Lane.

<sup>4</sup>See Lane, *The Model Claims Office Program*, *The Army Lawyer*, Aug. 1990, at 43 (providing guidance on completing the report form previously provided).

## Labor and Employment Law Notes

*OTJAG Labor and Employment Law Office, FORSCOM Staff Judge Advocate's Office, and TJAGSA Administrative and Civil Law Division*

### Equal Employment Opportunity Law

#### *Affirmative Action*

The Supreme Court recently affirmed the constitutionality of two minority preference policies adopted by the Federal Communications Commission (FCC). *Metro Broadcasting, Inc. v. Federal Communications Commission*, 1990 WL 85319 (U.S.), 58 U.S.L.W. 5053 (June 27, 1990). The two minority preference policies include, "(1) a program awarding an enhancement for minority ownership in comparative proceedings for new licenses, and (2) the minority 'distress sale' program, which

permits a limited category of existing radio and television broadcast stations to be transferred only to minority-controlled firms."

Non-minorities argued that these preference policies are in violation of their equal protection rights under the fifth amendment. The Court disagreed holding that the FCC policies had longstanding congressional support and direction and are substantially related to the achievement of the important governmental objective of broadcast diversity. The *Metro Broadcasting* Court ruled that because Congress specifically approved the minority

ownership policies, the Court owed appropriate deference to Congress's judgment.

The Court noted that Congress designed the minority ownership policies to eliminate the barriers that minorities face in entering the broadcast industry. Congress intended minority preference in the comparative licensing proceeding to compensate for the lack of minority broadcasting experience. The distress sale policy attacks the problem of inadequate access to capital by effectively lowering the sale price of existing stations.

#### *Sexual Harassment I*

The MSPB recently ruled that an administrative judge improperly analyzed a sexual harassment charge under Title VII when he sustained appellant's demotion. Appellant, a supervisor, approached a subordinate female letter carrier while she was in her jeep. He placed one arm under her leg and another around her shoulder. He then kissed her on the cheek, and stated that only her husband stood between their love for each other. Her complaint to a higher supervisor resulted in appellant's demotion.

The board independently analyzed appellant's conduct in light of the Postal Service policy. The board recognized that physical contact is an aggravating factor in selecting the penalty for sexual harassment. However, appellant's twenty-two years of discipline-free service, the fact that the incident was an isolated one rather than a pattern, and evidence that playful touching was part of the work environment, led the board to reduce the demotion to a ninety-day suspension. *Jordan v. United States Postal Serv.*, 44 M.S.P.R. 225 (1990).

#### *Sexual Harassment II*

In another recent sexual harassment case, the United States Court of Appeals upheld a \$90,000 sexual harassment verdict against Weyerhaeuser Co. *Baker v. The Weyerhaeuser Co.*, 903 F.2d 1342 (10th Cir. 1990).

Baker complained to her foreman in January and again in June that a co-worker was sexually harassing her. During this period Baker rebuffed the co-worker's "explicit and repeated" sexual overtures toward her. Baker's managers failed to report her complaint to higher management despite the co-worker's history of sexual harassment.

Baker charged her employer with violating Title VII of the 1964 Civil Rights Act by knowingly allowing sexual harassment in the workplace. She also claimed that she experienced emotional suffering and mental pain as a result of the sexual harassment.

The company argued that it was not liable because the harasser was not a supervisor and because the company ultimately discharged him. Baker argued that Weyer-

haeuser should have fired the employee earlier and that the company did not act when it should have.

The Tenth Circuit found that Weyerhaeuser discriminated against Baker. The court ruled that the harassment "was so severe and continuous as to create a hostile and abusive work environment establishing a Title VII claim and that Weyerhaeuser either knew or should have known of such fact, and failed to take corrective measures."

#### *Civilian Personnel Law*

##### *Coercion to Settle*

The MSPB ruled that an administrative judge's (AJ) statements regarding the likelihood of a party's success if they elect to pursue adjudication of an appeal does not constitute coercion to settle. *Lewis v. Department of the Navy*, 44 M.S.P.R. 373 (1990).

The Navy removed appellant for falsifying his SF-171 by failing to acknowledge a court-martial conviction and traffic fines exceeding \$100. During a prehearing conference with the AJ, the Navy agreed to cancel the appellant's removal and replace it with a voluntary resignation in exchange for appellant's withdrawal of his appeal. The AJ incorporated the settlement into the record and dismissed the appeal. Appellant subsequently petitioned for review, contending that the AJ had intimidated him into settling. He claimed the AJ had informed him that there was "no way" that he would rule in appellant's favor and that it would be "futile" for him to proceed with the hearing. Appellant also asserted that the AJ told the agency that he would not tolerate agency failure to uphold its end of the settlement agreement and that the agency would have to prove by "overwhelming evidence" that Appellant had falsified his SF 171.

The board acknowledged that coercion by an AJ is a factor that may render a settlement agreement invalid. Here, however, appellant's unsupported allegations did not overcome the presumption of the AJ's honesty and integrity.

#### *MSPB Decisions*

The Merit Systems Protection Board has revised its rules concerning practices and procedures for appeals and stay requests of personnel actions allegedly based on whistleblowing. Practitioners may find the new rules in the *Federal Register*, Vol. 55, No. 134, 12 July 1990.

#### *Labor Law*

##### *Remedy for Weingarten Violation*

The FLRA clarified the appropriate remedy concerning management's violation of an employee's right to union assistance at an investigatory examination. *Department of Justice, Bureau of Prisons, Safford, AZ and AFGE*, 35 FLRA No. 56, 35 FLRA 431 (1990).

Respondent allowed a bargaining unit employee to have a union representative present during an interview concerning her medical condition and resulting claim to light duty status. However, management instructed the union representative not to participate during the interview. After the interview, respondent suspended the employee for making false statements concerning her medical status.

The administrative law judge (ALJ) found that management violated 5 U.S.C. § 7114(a)(2)(B) by refusing to allow the union representative to participate in the examination. He also found that the union representative likely would have presented a document clearing the employee of the falsification charge had management allowed him to participate. Accordingly the ALJ recommended that the respondent rescind the suspension.

The Authority agreed that the union representative did have a right to participate; however, it declined to award such an extensive make-whole remedy. The FLRA relied on NLRB precedent, which orders the rescission of discipline in a *Weingarten* violation only when the reason for the discipline is the unfair labor practice itself, not the misconduct in question. The FLRA concluded that the purposes of 5 U.S.C. § 7101, which recognizes both the employees' right to organize and bargain collectively and the need for an effective and efficient government, would be served best by requiring management to conduct another interview allowing the union representative to participate. Should management conclude after the repeated interview that the discipline was unwarranted, it must cancel the suspension and make the employee whole for lost pay and benefits.

#### *Telephonic Interview Constitutes Formal Discussion*

The FLRA recently reversed an administrative law judge's decision that characterized a telephonic interview as "not formal" and therefore not triggering the union's 5 U.S.C. § 7114(a)(2)(A) right to be present. *Sacramento Air Logistics Center, McClellan AFB, CA and AFGE*, 35 FLRA No. 68, 35 FLRA 594 (1990).

An Air Force JAGC attorney learned that the union requested the presence of a specified unit employee to testify on behalf of a grievant in an upcoming arbitration hearing. The attorney called the potential witness, but he was unavailable. The witness's supervisor instructed him to return the attorney's phone call, and he complied. Before questioning the potential witness the attorney gave him the *Brookhaven* warning assuring him the interview would not be coercive.

The ALJ concluded that the interview was not formal in nature and recommended dismissal of the complaint. The FLRA ruled that, though the attorney did not have a formal agenda for the interview and did not take notes of the conversation, the attorney had a specific purpose for the call—learning whether the employee would testify

and what he knew about the incident in question. The FLRA considered the purposes of 5 U.S.C. § 7114(a)(2)(A) and concluded that the union had a "representational interest to safeguard in any discussion occurring at this meeting—the assurance that its witness was not coerced or intimidated prior to his appearance at the scheduled arbitration hearing...."

The FLRA also rejected the Air Force argument that union presence at prehearing interviews by management attorneys would require it to waive its "attorney work product privilege." The FLRA stated that nothing in its decision would require management attorneys to disclose their thoughts or impressions, whether written or not, resulting from the interview. "Rather, our decision effectuates the intent of Section 7114(a)(2)(A) of the Statute to allow a union to safeguard its representational interest by making sure that its witness is not coerced or intimidated prior to appearing at a scheduled arbitration hearing." The FLRA issued a cease-and-desist order and ordered a posting.

#### *Union Entitlement to Investigatory Material*

The FLRA reviewed an administrative law judge's decision that dismissed a complaint alleging violations of 5 U.S.C. §§ 7116(a)(1),(5), and (8). *Federal Aviation Admin., New England Region, Burlington, MA and National Assoc. of Air Traffic Specialists*, 35 FLRA No. 73, 35 FLRA 645 (1990).

An agent of Federal Aviation Administration's (FAA) security division interviewed employees involved in a suspected travel voucher falsification. The FAA compiled records of the information from the examination. The union requested the records of the examination after the U.S. Attorney informed the employees that he contemplated no criminal action, but that the agency was free to impose administrative discipline. The FAA refused, arguing that it would provide the records if it proposed disciplinary action.

The FLRA ruled that the 5 U.S.C. § 7114(b)(4) right to information covers all information that is necessary to a union's representational functions. It argued that although the requested information was relevant to the union's representational function the information was not "necessary" under the statute. The FLRA recognized that the employee and union are entitled to consult before the interview and to be informed of the nature of the prospective interview. However, the FLRA ruled that the union already knew the nature of the examination and did not "need" the information to perform its representational function. The FLRA balanced the union's right to obtain information necessary for its representational function against the FAA's need to investigate and discipline misconduct. It concluded that the agency's interest clearly outweighed that of the union.

### Union Dues

The FLRA ruled that the Air Force violated 5 U.S.C. §§ 7116(a)(1), (5), and (8) when it unilaterally changed the amount of union dues withheld. *Army and Air Force Exch. Serv., Peterson AFB, CO and AFGE*, 35 FLRA No. 90, 35 FLRA 835 (1990).

Because of administrative error, the agency failed to withhold seven dollars in union dues from certain employees in one pay period. Management deducted twenty-one dollars from those employees the next pay period after they failed to get union agreement on how to correct the error. Upon discovering that it erroneously had deducted seven dollars too much, the agency remitted seven dollars to each employee involved.

The FLRA ruled that management violated section 7116(a)(8) by failing to deduct the union dues for the first pay period. Section 7115 imposes "an absolute duty on agencies to honor the current assignments of unit employees by remitting regular and periodic dues ... to their exclusive representatives."

The FLRA ruled that the Air Force also violated section 7116(a)(5) when it unilaterally changed the procedures for deducting and remitting the dues to the union. Management changed a condition of employment when it collected an amount higher than seven dollars for a pay period. The authority issued a cease-and-desist order and ordered a posting. It also commented that the parties should have resolved the dispute "bilaterally" rather than resorting to formal appeal procedures.

### Area of Consideration

The FLRA has adopted the reasoning in *Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 857 F.2d 819 (D.C. Cir. 1988), which held nonnegotiable a union proposal that would require the agency to consider agency employees first before expanding the area of consideration. The D.C. Circuit ruled in that case that preventing management from assessing "the full range of potential candidates" when it makes its employment decisions, directly interferes with management's right to select from any appropriate source.

In the instant case, the proposal in question would require the agency to consider current technicians before considering military personnel for vacant positions. The result would cause the agency to make its initial employment decision before knowing of the qualifications of all available candidates. Following the court of appeals, the authority concluded that the restriction violates 5 U.S.C. § 7106(a)(2)(C). *NAGE and Tennessee Air Nat'l Guard*, 35 FLRA No. 93, 35 FLRA 886 (1990).

### Arbitrator Estopped

The FLRA remanded an arbitration award which found that an agency did not deny improperly a grievant's

priority consideration for a promotion. *Department of the Air Force, Scott AFB, IL and NAGE*, 35 FLRA No. 104, 35 FLRA 978 (1990).

After the arbitrator rendered his decision, the Authority found in a related unfair labor practice (ULP) case that the selecting official was biased against priority candidates. In that decision, the FLRA concluded that the selecting official's statements, that he would not select priority candidates, had a chilling effect on employees' 5 U.S.C. § 7102 right to file grievances. The arbitrator, making his own determination on the issue, did not find the selecting official biased. The FLRA ruled that the official's statements estopped the arbitrator from reaching a different determination of bias. It remanded the case to the parties for resubmission to the arbitrator for clarification in light of the ULP decision. The arbitrator must determine whether the bias of the selecting official entered into his decision not to select the grievant; and, if so, he must fashion an appropriate remedy.

### Official Mail

The FLRA considered an agency-disapproved provision in a collective bargaining agreement that would permit the union to use "penalty mail" for representational purposes. Penalty mail is "official mail of officers of the U.S. Government which is authorized to be mailed without prepayment of postage." The FLRA found that, because the union would use the privilege for representational purposes, the provision concerned a condition of employment. Nothing in the statute prohibited that use by the union. In fact, Postal Service regulations give an agency discretion to determine what type of mail relates to its official business. Grievances and complaints were listed as examples of mail that an agency might choose to send via penalty mail. The FLRA ruled that the provision was within the agency's duty to bargain. *NFFE and United States Dep't of Agric., Forest Serv.*, 35 FLRA No. 109, 35 FLRA 1008 (1990).

### Consultation With Labor Organizations

The Army recently published a memorandum prescribing the responsibilities under 5 U.S.C. § 7113 to consult with labor organizations on policies affecting DA civilian employees before issuing those policies. DA directed the memorandum to principal officials of HQDA and their field operating agencies and pertains to labor organizations holding national consultation rights with HQDA.

The memorandum requires the principal officials to: 1) review policies and procedures to determine whether they involve any substantive change in conditions of employment; 2) coordinate labor aspects of proposed issuances with DCSPER to determine whether a proposed policy involves a substantive change in the conditions of employment for civilian employees of DA; and



3) furnish the labor organizations (a) reasonable notice (thirty to forty-five days) of proposed new or revised Armywide policies or procedures that involve any substantive change in the conditions of employment for both appropriated and nonappropriated fund employees, (b) opportunity for comment on such proposals, (c) opportunity to suggest changes to such proposals, and (d) opportunity to give views in writing at any time.

If a labor organization presents any views or recommendations under the above paragraph, the proponent staff agency will: 1) consider the views or recommendations presented before taking final action on any matter regarding those views or recommendations (agencies should coordinate proposed issuances and responses to labor organizations with the appropriate office having policy responsibility); and 2) furnish the responding labor organization a written statement of the reasons for taking the final action.

The DCSPER will offer assistance to principal officials of HQDA and their field operating agencies to ensure that agencies appropriately consult with, and accord national consultation rights to, labor organizations in accordance with the law. Practitioners should forward requests for assistance to the DCSPER (DAPE-CPL).

Failure to give labor organizations the opportunity to comment, before issuance, on proposed policies that affect civilian employees of DA may be a violation of 5 U.S.C. § 7113. Refusal to consult on such policies also may constitute an unfair labor practice. Counsel should note that, although the proponent of the proposed policy must give due consideration to any recommendations submitted by the labor organizations, no obligation arises to adopt these recommendations.

#### *Drug Testing*

A court recently granted the AFGE a temporary restraining order preventing the U.S. Air Force from implementing parts of its random drug testing program on civilian employees. *AFGE v. Wilson*, 28 GERR 840 (July 2, 1990).

The court held that "high risk" categories of employees, such as those with top secret clearances, air traffic controllers, and parachute packers are exempt from the restraining order and the Air Force may still test them.

The court noted that automatically disciplining a worker who tests positive for drugs is a violation of the Civil Service Reform Act. In addition, the court modified the Air Force's post-accident and safety mishap plan, which allowed the Air Force to test any worker involved in any type of accident, by ordering the Air Force to include only those employees involved in major accidents.

#### *Employee Relations Bulletin #40*

Employee Relations Bulletin #40 provides information in a question and answer format concerning areas in which regulatory guidance is unclear. Question 2 asks whether a lump sum cash payment, not tied to back pay, may be part of a settlement agreement. The "yes" answer stated that no prohibition on lump sum payments exists, but that labor counselors must consider the facts and circumstances surrounding each individual case when determining appropriate terms of a settlement agreement.

Practitioners who are unfamiliar with the statutory and regulatory parameters with which labor counselors must deal in crafting settlement agreements may misinterpret that response. We understand the original question concerned any requirement to itemize in the negotiated agreement the bases for reaching the lump sum settlement. No requirement exists, of course, to itemize individually each basis of potential recovery. However, agencies do not have authority to make lump sum settlement payments that are not related to back pay (assuming a finding of an unjustified and unwarranted personnel action) or would exceed the maximum amount that would have been recoverable under Title VII if a finding of discrimination were made. Additional guidance concerning this matter will appear in a subsequent issue of the Employee Relations Bulletin.

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## **Criminal Law Division Note**

*Criminal Law Division, OTJAG*

### **Supreme Court—1989 Term, Part V**

*Colonel Francis A. Gilligan  
Lieutenant Colonel Stephen D. Smith*

In *New York v. Harris*<sup>1</sup> a divided Supreme Court refused to apply the exclusionary rule to an inculpatory statement

obtained from a defendant outside of his premises, even though law enforcement authorities earlier had violated

<sup>1</sup>47 Crim. L. Rep. (BNA) 2024 (U.S. Apr. 18, 1990).

the in-home arrest warrant requirement of *Payton v. New York*.<sup>2</sup> Specifically, the *Harris* Court held that when police fail to obtain a warrant to arrest a suspect and, during his in-home arrest the suspect renders an inculpatory statement, a subsequent voluntary statement made by the accused at the police station is admissible against the defendant at trial. In particular, the Court ruled that at trial on the merits, the government may admit the statement made by the defendant at the police station without proving that the defendant's statement was independent or so attenuated as to remove the taint of the inculpatory statement obtained incident to the earlier *Payton* violation.

On January 16, 1984, three police officers with probable cause to arrest Harris went to his apartment. When the police arrived, they knocked on the door, and displayed their guns and badges. Harris let them enter. Once inside, the officers read Harris his rights, which he waived. Upon questioning, Harris admitted to killing a Ms. Stanton. The police then arrested Harris and took him to the station house, where he again waived his rights after receiving a re-advisal of his *Miranda* warnings. He subsequently rendered to law enforcement authorities a signed, written, inculpatory statement, which the government used against Harris at trial. On appeal of his conviction, the Supreme Court accepted the findings below that the police had probable cause to arrest Harris, but Harris did not consent to the entry of his home. Although the Court found that law enforcement authorities had violated the warrant requirement of *Payton*, it refused to suppress the statement made at the station house because the "principal incentive to obey *Payton* still obtains: the police know that a warrantless entry will lead to the suppression of any evidence found, or statements taken inside the house."<sup>3</sup> The Court then went on to indicate that "any incremental deterrent value" gained by suppressing evidence obtained beyond the confines of the dwelling would be minimal.<sup>4</sup>

Justice Marshall, dissenting, stated that the majority's "reasoning amounts to nothing more than an analytical sleight-of-hand, resting on errors in logic, misreadings of our cases, and an apparent blindness to the incentives the Court's ruling creates for knowing and intentional consti-

tutional violations by the police."<sup>5</sup> The dissent explained that the majority's ruling will force the police to decide whether they should look for physical evidence that they may find in a house or on an arrestee, or instead look for an incriminating statement. If the police are looking only for the best way to obtain a statement from a suspect and think no worthwhile evidence exists in the suspect's home, the majority's holding provides an additional incentive for police to ignore the warrant requirement of *Payton* and to follow the approach the police followed in *Harris*.

Even though the law enforcement authorities in *Harris* violated *Payton*, the Court refused to extend the exclusionary rule to derivative evidence in the form of statements obtained outside of the premises. It noted that the *Payton* violation ends when police remove the individual from his home, as long as probable cause for the arrest existed.<sup>6</sup> The majority asserted that the deterrent value of the *Payton* rule still applies because physical evidence and statements obtained in the home would be inadmissible, and most officers would be unwilling to risk losing such evidence because they did not obtain an arrest warrant.<sup>7</sup> The majority also distinguished its earlier cases stating that in each of those cases, the Court suppressed the statement following the illegal arrest because the police lacked probable cause in the first instance.<sup>8</sup>

The *Harris* majority could have justified its holding in a more reasonable manner had it viewed this as an isolated case. Specifically, the majority could have alluded to New York's unusual rule that, once a judicial officer has issued an accusatory instrument such as an arrest warrant, the police may not question the subject unless a lawyer is present.<sup>9</sup> Accordingly, the Court could have stressed that not admitting the second statement from Harris would have had a substantial impact on trial accuracy as the appellant made no allegation that the statement was untrue, coerced, or involuntary, or that the police violated his rights under *Miranda*.

Military Rule of Evidence 311(e)(2)<sup>10</sup> adopts the derivative evidence rule applied by the Supreme Court prior to *Harris*. The arguments we presented in an earlier article<sup>11</sup> apply in answering this question: Is Rule 311(e)(2) now only a guideline; or, since it is now more

<sup>2</sup>445 U.S. 573 (1980) (requiring an arrest warrant to make an arrest in a suspect's home in the absence of the occupant's consent or exigent circumstances).

<sup>3</sup>47 Crim. L. Rep. at 2026.

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>*Id.* at 2025-26.

<sup>7</sup>*Id.*

<sup>8</sup>*Id.* at 2025.

<sup>9</sup>*Id.* at 2027 n.2.

<sup>10</sup>Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 311(e)(2).

<sup>11</sup>Gilligan & Smith, *Supreme Court—1989 Term, Part II*, The Army Lawyer, May 1990, at 93.

restrictive than the requirements delineated *Harris*, does Rule 311(e)(2) hold the government to a higher standard?

Earlier this term in *James*,<sup>12</sup> the Court held that the government may use a confession obtained after an illegal arrest only to impeach the accused. Law enforcement authorities arrested James in a public place without probable cause. James later rendered a statement to police in the squad car and another statement to officials at the police station. The trial court suppressed both statements as inadmissible on the merits and, on appeal before the Supreme Court, the government did not contest that ruling.<sup>13</sup>

Three critical differences distinguish *James* from *Harris*. First, while police had probable cause to arrest Harris, no such probable cause existed in *Jones*. In addition, police arrested Jones in public, whereas in *Harris* the arrest occurred in the suspect's home. Finally, in contrast to the statements that Jones made to law enforcement officials, exclusion of the controverted statements in *Harris* apparently would have had a substantial impact on trial accuracy. Evidently, these distinctions were significant to Justice White, the only Justice to be in the majority in both *James* and *Harris*.<sup>14</sup>

Authorities should find little disagreement with the result in *James*. When probable cause did not exist at the time of an arrest, law enforcement exploitation of that illegal arrest through custodial interrogation should not result in any benefit to the prosecution. Indeed, if the exclusionary rule is to retain any deterrent effect, law enforcement exploitation of initial wrongs should be as repugnant as the initial wrong itself. Accordingly, commentators also should criticize *Harris* within the context of police misconduct. Officers intentionally and wrongfully entered Harris's residence to arrest him.<sup>15</sup> The officers' presence in Harris' home was unlawful, and the arrest further violated the warrant requirement of *Payton*. Moreover, a search incident to the arrest would have been unlawful under the circumstances in *Harris*, and the police had no authority to seize anything under the plain view doctrine. Yet, merely because police removed Harris from the premises, the Court's majority found that

the abrupt change in circumstances from the initial illegality was sufficient to sever the *Payton* violation completely from the police's subsequent interrogation of the defendant. Unfortunately, the statements from that subsequent interrogation provided a direct prosecutorial benefit on the merits. Consequently, the ruling does not deter police misconduct; instead, it actually may encourage it.

The argument that nothing requires the suppression of Harris's person realistically does not support the Court's ruling in *Harris*.<sup>16</sup> While the exclusionary rule actually does not provide for suppressing persons as if they were illegally seized evidence, the issue raised in *Harris* does not concern the defendant's person or the grounds for his arrest. Rather, the question posed by *Harris* is, assuming an initial illegality, how should the courts apply the Constitution against the arresting officials with respect to their subsequent conduct? The *James* case seemingly provides the answer—the law should not permit exploitation of the original illegality to bear admissible fruits. Viewed from another perspective, the incentive should be to follow the law rather than disregard the law to take advantage of technical, artificial severances such as the front door of a dwelling.

In *Minnesota v. Olson*<sup>17</sup> the Supreme Court held that an overnight house guest has standing to object to a search even though the regular occupant did not leave him alone in, or give him a key to, the residence. The Court also indicated that the Minnesota Supreme Court was essentially correct in determining that exigent circumstances for a search exist when law enforcement authorities have probable cause that imminent destruction of evidence may occur, or probable cause to believe that the search is necessary to prevent a suspect from escaping. In assessing the exigent circumstances, a court may consider the risk of danger, the gravity of the crime, and the likelihood that the suspect is armed.

In *Florida v. Wells*<sup>18</sup> the Court held that the inventory of a closed container violated the fourth amendment when the law enforcement authorities lacked any policy to "canalize" the discretion of the police officers conducting the inventory. Justice Rehnquist, writing for the

<sup>12</sup>*James v. Illinois*, 46 Crim. L. Rep. (BNA) 2051 (U.S. Jan. 10, 1990).

<sup>13</sup>*Id.* The trial court had ruled James' statements inadmissible. Thereafter, the prosecution attempted to use the suppressed statements to impeach a defense witness. Before the Supreme Court, the Government made no contention that the court below erroneously had suppressed the statements. *Id.*

<sup>14</sup>Marsh, *White Becomes High Court's Key Vote*, The Washington Post, June 25, 1988, at A1, col. 1.

<sup>15</sup>See 47 Crim. L. Rep. at 2027 n.2 (Marshall, J., dissenting).

<sup>16</sup>*Id.* at 2025.

<sup>17</sup>47 Crim. L. Rep. (BNA) 2031 (U.S. Apr. 18, 1990).

<sup>18</sup>47 Crim. L. Rep. (BNA) 2021 (U.S. Apr. 18, 1990).



five member majority, indicated that the procedures regulating discretion did not require an all or nothing proposition, although language in *Colorado v. Bertine*<sup>19</sup> lends some support to that view.

A police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened, in light of the nature of the search and characteristics of the container itself. Thus, while policies of opening all containers, or of opening no containers, are unquestionably permissive, it would be equally permissive, for example, to allow the opening of closed containers whose contents officers determine they are unable to ascertain from examining the containers' exteriors.<sup>20</sup>

Justices Brennan, Marshall, and Blackmun concurred with the *Wells* majority. Justice Blackmun, however, would not join in "the majority's statements on the issue perhaps ... to be regarded as ... dicta."<sup>21</sup> He agreed that the fourth amendment does not impose an "all or nothing" requirement. But "[a] State ... consistent with the Fourth Amendment, probably could not adopt a policy which requires the opening of all containers that are not locked, or a policy which requires the opening of all containers over or under a certain size, even though these policies do not call for the opening of all or no containers."<sup>22</sup> Justice Stevens also concurred in *Wells* but renewed a complaint registered in earlier opinions that the Court should not review a state court's judgment that is obviously correct "[u]nless we are to become self-appointed editors of state court opinions in the criminal law area."<sup>23</sup>

<sup>19</sup> 479 U.S. 367 (1987).

<sup>20</sup> 47 Crim. L. Rep. at 2021.

<sup>21</sup> *Id.* at 2023.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See, e.g., *United States v. Jasper*, 20 M.J. 112 (C.M.A. 1985).

<sup>25</sup> See 47 Crim. Law Rep. at 2021. The Court of Military Appeals has raised similar concerns about the discretion vested in those conducting administrative intrusions. See *United States v. Harris*, 5 M.J. 44 (C.M.A. 1978). Despite the Court of Military Appeals' decision in *United States v. Jones*, the absence of discretion seems a recurring theme in Supreme Court decisions supporting administrative programs. See 24 M.J. 294 (C.M.A. 1987); *Michigan Dep't of State Police v. Stitz*, 47 Crim. L. Rep. (BNA) 2155 (U.S. June 14, 1990).

The holding in *Wells* with respect to inventories provides guidance for application of Military Rule of Evidence 313(c). As with all administrative intrusions, the commander must identify the purpose that the search will serve from the outset. In the case of inventories, proper administrative purposes include safeguarding property, protecting the government from false claims, and ensuring the safety of law enforcement officials when holding property belonging to apprehendees or detainees.<sup>24</sup> Based upon a sound purpose statement, a commander should develop a standing operating procedure (SOP) that establishes both the scope and permissible incidents of an inventory. Even if the proponents of an SOP do not detail each step, an SOP containing 1) a valid purpose statement that sets the scope of an inventory, 2) a precise statement of when the commander will conduct the inventories, and 3) a minimal degree of detail concerning how the commander wants his leaders to execute his inventories, should suffice to remove discretion from officials conducting inventories and satisfy the concerns raised in *Wells*.<sup>25</sup>

The result in *Wells* presents a number of issues. Must the commander memorialize the SOP? If a long practice covering the purpose and scope of inventories has existed, will such a usage satisfy the court? If an SOP existed, but the inventorying officer did not know about it, would a long practice of conducting inventories satisfy the court? If the officer conducting the inventory does not know about the SOP, but has received specific directions from someone with knowledge of the SOP, can the court impute the knowledge of the directing officer to the inventorying officer?

## Procurement Fraud Notes

*Procurement Fraud Division, OTJAG*

### Program Fraud Civil Remedies Act— The "Niche" Remedy

The Program Fraud Civil Remedies Act (PFCRA)<sup>1</sup> is the center of attention in 1990. The Department of

Defense Inspector General (DODIG) has referred its first case to the Army for processing, and the Criminal Investigation Command (CID) has forwarded a number of cases for informal preliminary reviews. Procurement

<sup>1</sup> 31 U.S.C. §§ 3801-3812 (1984).

fraud advisors (PFAs) and CID agents frequently are hearing the question—"What about PFCRA?"

To answer, we first must understand the purpose, scope and limitations of PFCRA.

**Purpose:** Congress enacted PFCRA to provide an *additional* remedy against fraud because it perceived that "present criminal and civil remedies ... are not sufficiently responsive"<sup>2</sup> to low-dollar frauds. PFCRA is an administrative remedy with civil litigation procedures not unlike those found before the Armed Services Board of Contract Appeals.

**Scope:** PFCRA is available to remedy false claims, whether paid or not, and false statements accompanied by certifications. Remedies include an assessment, in lieu of damages, of twice the amount of the false portion of a claim that the government has paid, plus up to \$5,000 per false claim or certified false statement. Actual penalties are likely to be significantly less, however, unless aggravating factors exist. Department of Justice (DOJ) regulations list sixteen factors to consider in assessing penalties.<sup>3</sup>

**Limitations:** Government counsel should consider a number of factors in determining whether the use of PFCRA proceedings is appropriate. First, the PFCRA has several jurisdictional limitations. PFCRA applies only to false claims or certified false statements made after 21 October 1986. In addition, PFCRA applies only to cases in which the actual loss is not more than \$150,000 per false claim. As a practical matter, however, the DOJ or U.S. Attorney may criminally prosecute a case involving less than \$150,000. Finally, PFCRA cases must not be subject to DOJ/U.S. Attorney civil action. PFCRA does not require criminal declination, but an ongoing criminal investigation usually indicates PFCRA is at least premature because a criminal prosecution is preferable and usually leads to more effective and efficient application of civil, administrative, and contractual remedies.

The PFCRA also imposes some evidentiary limitations. Because it allows for an administrative remedy, PFCRA imposes a preponderance of the evidence standard, both for the false claims/statements *and* for the actual damages. Moreover, evidence used in a PFCRA action must be readily available, rather than scattered across three continents or locked up in grand jury proceedings. Lastly, the investigation prior to the final report of investigation (ROI) should be thorough. Filling in the gaps in an inadequate ROI from HQDA often proves to be too late and too slow to satisfy PFCRA evidentiary requirements.

In addition to jurisdictional and evidentiary limitations, the PFCRA has practical limitations as well. The

practitioner first must conduct a remedies analysis to determine whether PFCRA fits the case. PFCRA is a supplemental remedy, designed to catch cases that otherwise would "fall through the cracks." PFCRA is *not* a substitute for criminal prosecution and other available and appropriate remedies. In addition, the practitioner must evaluate the case's significance in terms of actual damages and in terms of principle. The investigatory, legal, and financial resources for attacking procurement fraud are not unlimited. Full proceeding PFCRA cases will cost \$5,000 to \$10,000 for the Army to obtain an administrative law judge from another government agency and for government temporary duty pay. The practitioner also must decide whether aggravating factors in the case favor significant assessments for false claims/statements, or whether mitigating factors favor only limited assessments. Finally, the practitioner must evaluate the potential for actual recovery by questioning whether a bankruptcy is on the horizon. PFCRA actions against judgment-proof defendants would be futile and would waste resources.

"What about PFCRA?" is really just another question that a practitioner should ask and answer in his or her normal remedies analysis. Counsel must remember that four categories of remedies are available: criminal, civil, contractual, and administrative. In addition, various remedies exist in each category. For instance, criminal remedies include actions in United States District Court, Magistrate Court, courts-martial (under the Uniform Code of Military Justice (UCMJ)), and state/local courts. Counsel also should keep in mind that PFCRA is just one of a variety of administrative remedies. Military and civilian employee disciplinary actions, Debt Collection Act (DCA) proceedings, and even Reports of Survey in appropriate cases, are examples of a plethora of others.

Even with its double assessment for *paid* false claims, PFCRA will not always recover more money. In travel fraud, for example, the application of GAO's "tainted-day" rule in a DCA proceeding often will recover more money than PFCRA.<sup>4</sup> Under the GAO rule, fraud on any day taints the entire claim for that day, and hence the claimant will forfeit that day's entire *per diem*. Under PFCRA, however, only twice the fraudulent amount is recoverable. Therefore, a claim that includes twenty-five dollars in fraudulent meal charges out of seventy-five dollars *per diem* yields a PFCRA double assessment of fifty dollars, but a DCA recovery of seventy-five dollars. In an appropriate case, of course, the government could obtain a penalty of up to \$5,000 under PFCRA.

Moreover, fraud remedies are not just about money. Statutes and regulations vest Army commanders with broad authority and discretion in decisions affecting

<sup>2</sup>Pub. L. No. 99-509, § 6104(a) (1984).

<sup>3</sup>See 28 C.F.R. § 71.31 (1988).

<sup>4</sup>See 68 Comp. Gen. 517 (1989); Ms. Comp. Gen. B-217989 (17 Sep. 1985).

good order and discipline—including fighting fraud. Remedies analysis must account for commanders' determinations as to the appropriateness of available remedies. A commander may not get much money out of a UCMJ article 15 proceeding, but may use a nonjudicial punishment action to make a positive disciplinary impact. Similarly, DCA proceedings may not always recover more than PFCRA, but they are faster and collection comes directly from pay, which has a substantial impact.

**"What about PFCRA?"** PFCRA really is a "niche" remedy. Practitioners in the field of procurement fraud have not defined the "niche" quite yet, but we have a rough idea. First, counsel should identify cases involving false claims/statements and damages too low for DOJ/U.S. Attorney interest. Counsel should find out if the government actually paid the false claim, what the false amount was, and if the claimant certified a false statement to obtain payment. Next, counsel should evaluate the evidence. If the evidence is insufficient for DOJ/U.S. Attorney interest, the case is not a good PFCRA candidate. In addition, a lack of aggravating evidence, or an apparent abundance of mitigating or extenuating evidence, may indicate that a significant recovery will be unlikely. Accordingly, even with sufficient evidence, the equities of the case may reduce DOJ/U.S. Attorney interest.

After examining the evidentiary and equitable posture of the case, practitioners must analyze recoverability and remedies. Specifically, counsel must ask whether the Army will be able to collect a PFCRA award from the defendant. Counsel then must determine, after considering all available remedies, is PFCRA appropriate? If the answer to these questions is yes, and the case satisfies the evidentiary and equitable tests discussed above, you have found the "niche".

If you have potential PFCRA cases and want to discuss them, or have any other questions about PFCRA, please call Major Ric Fiore or Lieutenant Colonel Alan Hahn at (202) 504-4278 (AV: 285-4278). Major Uldric L. Fiore, Jr.

### **Why Not Use All the Remedies?**

#### *Prologue*

This is the saga of two related contractors whose performance of Corps of Engineers (COE) contracts at Fort Riley, Kansas, ultimately led to the coordinated use of all four remedies—criminal, civil, contractual and administrative—as part of a global settlement.

#### *The Case*

The contractors are McCarty Corp. (McCarty), a general contractor from Austin, Texas, and N.G. Adair, Inc. (Adair), a sheet metal contractor also from Austin, and a frequent subcontractor for McCarty. The son of

McCarty's founder owns one hundred percent of Adair, owns eight percent of McCarty, and is a beneficiary of a Trust that owns the remaining ninety-two percent of McCarty.

In 1984, the Army awarded Adair a contract to replace furnaces and install air conditioning and attic insulation in Fort Riley family housing. In 1985, the Army awarded McCarty a contract to rehabilitate mechanical and electrical systems in the Fort Riley hospital; McCarty subsequently subcontracted Adair to install the hospital's duct work. In 1986, the Army awarded Adair another contract to provide furnaces and air conditioning, and to remove boilers, radiators, pipes, and asbestos insulation in Fort Riley family housing.

On the family housing contracts, Adair installed ten used furnaces that Adair and McCarty had used to heat work areas on the hospital contract after COE had advised Adair that the used furnaces would not be acceptable in the housing. Nevertheless, Adair removed the used furnaces from the hospital, altered the serial numbers, and installed them in the family housing. In addition, Adair disposed of asbestos that the contractor was supposed to remove by concealing it in crawl spaces and attics, and by covering it with dirt or insulation.

On the hospital subcontract, Adair deliberately omitted entire exhaust runs, installed improper mixing boxes, and used square duct rather than spiral duct as required. Adair falsified ventilation tests by opening and closing vents and returns on other floors. Adair installed fire dampers (which contain and prevent fire and smoke from spreading through the ductwork) with angle irons that the contractor secured with glue instead of bolts. Workers glued screw heads to the angle irons to make them appear properly secured. Adair used duct tape to hold a damaged fire damper open, and workers improperly installed screws to prevent another damper from closing. Accordingly, during a fire, dampers would offer no protection from the spreading flames, posing an extreme safety hazard for all hospital personnel and staff.

Adair also intentionally violated the Buy American Act by installing Canadian made motorized fire dampers in the hospital. Further, after COE agreed to allow the Canadian dampers as long as they used American "motors," Adair removed the dampers, scraped off the foreign identification stickers, and reinstalled them with the same Canadian motors. Adair also installed Portuguese ductwork. After discovery and COE direction to remove it, Adair eliminated or concealed the foreign markings, and reinstalled the ductwork in the hospital.

On the hospital contract, McCarty cut roof structure anchor bolts down to one to three inches, although the contract required workers to anchor them over six inches deep in concrete. The cut bolts provided no structural strength. In addition, sixty percent of the bolts failed strength tests due to improper epoxy installation.

McCarty also failed to construct a concrete infill beam on the top floor of the hospital. The contractor concealed this omission by cutting the bolts that workers should have anchored in the beam so that the bolts would not protrude from the ceiling and therefore would not be visible.

In these instances, McCarty and Adair intentionally failed to perform the work per contract specifications and fraudulently submitted claims for payment that the government subsequently paid. As a result of the investigation, on 12 July 1989, the United States District Court for the District of Kansas received the indictments of Adair, its president, and its Fort Riley superintendent for false claims, false statements, and conspiracy, in violation of 18 U.S.C. §§ 287, 1001, and 371, respectively.

### *The Remedies*

On 25 July 1989, the Army suspended Adair, its president, and its Fort Riley superintendent based on the indictment, and Adair's vice president and secretary/treasurer based on imputation of the corporate misconduct.

On 30 November 1989, Adair and McCarty, which was not yet indicted, entered into a plea agreement with the U.S. Attorney that included the following:

—Adair agreed to plea nolo contendere to a false statement and guilty to a false claim, and to pay a fine of \$100,000, in exchange for the dismissal with prejudice of all remaining charges against Adair and all charges against its president and its Fort Riley superintendent.

—McCarty consented to a \$100,000 civil judgment under the False Claims Act, 31 U.S.C. § 3729, in exchange for the U.S. Attorney's agreement not to seek McCarty's indictment.

—Adair also agreed to contract and pay for asbestos remediation in the Fort Riley housing, where it had improperly removed and disposed of asbestos. Adair completed this remediation by 1 March 1990, at a cost of approximately \$250,000.

—Further, both Adair and McCarty agreed to settle all outstanding contract claims by waiving claims of approximately \$50,000 and claims for contract retainages of approximately \$170,000 in satisfaction of the Army's claims.

On 2 March 1990, Adair and McCarty paid the \$200,000 in fines and civil damages. On 16 May 1990, the Army proposed the debarment of Adair, its officers and superintendent, and an affiliate into which Adair is merging. Decision on the proposed debarments is pending.

Following the indictment of Adair, McCarty actively sought to re-establish its present responsibility to avoid debarment, which significantly contributed to the resolution of criminal, civil, and contractual liabilities of both Adair and McCarty. On 16 May 1990, the Army entered

into an administrative settlement agreement with McCarty. The linchpin of the settlement is McCarty's agreement to implement a system of project quality managers to ensure quality, contract compliance, and safety on its government construction projects. The system includes the following:

—During the three-year term of the agreement, McCarty will employ a full-time, on-site quality manager, who will be responsible for the day-to-day quality control on the project. McCarty will advise the contracting officer of the name and telephone number of the quality manager for each project.

—Quality managers' authority extends to compliance with contract material and workmanship specifications, material testing and inspections, Buy American Act requirements, and any safety issues. Quality managers have written authority from the president to issue a "Stop Work" order for the project or any part until they can obtain a determination from the president, and will have direct access to the president on quality issues.

—Quality managers will have no project schedule or budget responsibility. In addition, superintendents, project managers, and personnel with similar responsibilities will not supervise quality managers. Quality managers will not receive compensation, bonuses, or incentives based on schedule or budget objectives, but may receive compensation based on quality and safety objectives.

### *Epilogue*

This case successfully and appropriately applied all the different remedies because of the thorough investigation and close coordination among the government representatives. Investigators, PFA's, prosecutors, and Procurement Fraud Division must work closely to accomplish this type of result.

**Criminal Remedies:** Conviction of N.G. Adair, Inc., on two felony counts, \$100,000 fine, \$250,000 restitution (asbestos).

**Civil Remedies:** Civil fraud judgment against McCarty Corporation for \$100,000.

**Contractual Remedies:** Contract settlements in which N.G. Adair, Inc., and McCarty Corporation withdrew \$50,000 in claims and waived \$170,000 in retainages.

**Administrative Remedies:** Proposed debarments of N.G. Adair, Inc., three officers and the superintendent, and an affiliate. Settlement agreement with McCarty Corporation.

Congratulations for the result go to CID Special Agent Mike Pitts of the Fort Riley Field Office, USACIDC; DCIS Special Agent John Eikel of the Chicago Field Office, DCIS; DCIS Special Agent Ed Outlaw of the Chicago Field Office, DCIS; PFA Dale Holmes, Attorney-Advisor from the Kansas City District COE; and Assistant U.S. Attorney Richard Hathaway of Topeka, Kansas. Major Uldric L. Fiore, Jr.

# Guard and Reserve Affairs Items

*Judge Advocate Guard and Reserve Affairs Department, TJAGSA*

## Reserve Component Quotas for Resident Graduate Course

The Commandant, TJAGSA, has announced that he has set aside two student quotas in the 40th Judge Advocate Officer Graduate Course (29 July 1991—15 May 1992) for Reserve component JAGC officers. The faculty of The Judge Advocate General's School teaches the forty-two week graduate level course at the School in Charlottesville, Virginia. The School awards successful graduates the degree of Master of Laws (LL.M.) in Military Law. JAGC RC captains and majors with at least four years JAGC experience, as of 29 July 1991, are eligible to apply. Officers who have completed the Judge Advocate Officer Advanced Correspondence Course may apply for the resident course. Each applicant must receive a nomination from his or her commander or IMA rater.

### 1. Contents of Application Packet:

a. Personal data: Full name (including preferred name if other than first name), grade, date of rank, age, address, telephone number (business and home).

b. Military experience: Chronological list of reserve and active duty assignments.

c. Awards and decorations: List of all awards and decorations.

d. Military and civilian education: Schools attended, degrees obtained, dates of completion, and any honors awarded. Law school transcript.

e. Civilian experience: Resume of legal experience.

f. Statement of purpose: In one or two paragraphs, state why you want to attend the resident graduate course.

g. Letter of Recommendation:

(1) USAR TPU: Military law center commander or staff judge advocate.

(2) ARNG: Staff judge advocate.

(3) USAR IMA: Staff judge advocate of proponent office.

h. DA Form 1058 (USAR) or NGB Form 64 (ARNG): Officers must fill out these forms and include them in the application packet.

### 2. Routing of Application Packets:

a. TJAGSA must receive all applications no later than 15 January 1991.

b. Officers should forward each packet through appropriate channels as follows:

(1) ARNG: Through the state chain of command to ARNG Operating Activity Center, ATTN: NGB-AROME, Building E6814, Edgewood Area, Aberdeen Proving Grounds, MD 21010-5420.

(2) USAR CONUS TROOP PROGRAM UNIT (TPU): Through MUSARC chain of command, to Commander, ARPERCEN, ATTN: DARP-OPS-JA, St. Louis, MO 63132-5200.

(3) USAR CONTROL GROUP (IMA/REINFORCEMENT): Commander, ARPERCEN, ATTN: DARP-OPS-JA, St. Louis, MO 63132-5200.

## 1991 JAG Reserve Component Workshop

The Guard and Reserve Affairs Department will hold the 1991 JAG Reserve Component Workshop at The Judge Advocate General's School in Charlottesville, Virginia, during the period 23-26 April 1991. As in the past, attendance will be by invitation only. Attendees should expect to receive their invitation packets by the end of December 1990. It is important that invitees notify TJAGSA of their intention to attend by the suspense date set in the invitation. Any suggestions as to theme, topics, or speakers for the 1991 workshop are welcome. Additionally, any materials or handouts that might be appropriate for distribution at the workshop would also be welcome. Because the planning process for the 1991 agenda is currently in progress, early input from the field is necessary. Send all comments and materials to The Judge Advocate General's School, ATTN: Guard and Reserve Affairs Department, Charlottesville, VA 22903-1781.

## 1991 JATT Training Dates

The Judge Advocate General's School (TJAGSA) will conduct Judge Advocate Triennial Training (JATT) for International Law/Claims Teams and Contract Law Teams from 17-28 June 1991. Inprocessing will take place on Sunday, 16 June 1991. Attendance is limited to commissioned officers only; units should schedule alternate AT for warrant officers and enlisted members. The 2093d U.S. Army Reserve Forces School (USARFS), Charleston, West Virginia, will host the training; orders will reflect assignment to the 2093d USARFS with duty station at TJAGSA.



JATT is mandatory for all International Law/Claims Teams and Contract Law Teams. Only their CONUSA staff judge advocate, with the concurrence of the Director, Guard and Reserve Affairs Department, TJAGSA, may excuse individuals belonging to these units.

Units should forward a tentative list of members attending AT at TJAGSA to the JAG School, ATTN: JAGS-GRA (CPT Griffin), no later than 26 October 1990. Units must furnish final lists of attendees no later than 15 March 1991. Units are responsible for ensuring attendance of unit personnel. GRA will report "no-shows" to respective ARCOM commanders for appropriate action. Units should not issue orders to team members who do not appear on the final list of attendees submitted by the unit. GRA will send home personnel reporting to Charlottesville whom units have not previously enrolled in JATT. GRA encourages commanders to visit their units during the training; however, commanders should coordinate these visits in advance with Captain Griffin of the Guard and Reserve Affairs Department at the telephone numbers listed below.

GRA invites ARNG judge advocates to attend this training; ARNG judge advocates may obtain course quotas through channels from the Military Education Branch, Army National Guard Operating Activity Center, Aberdeen Proving Ground. Point of contact at TJAGSA for this course is Captain Griffin, Guard and Reserve Affairs Department, telephone (804) 972-6380 or AutoVON 274-7110, ext. 972-6380.

## 1991 JAOAC Training Dates

The Judge Advocate Officer Advanced Course (JAOAC), Phase VI, is scheduled at TJAGSA from 17-28 June 1991. Inprocessing will take place on Sunday, 16 June 1991. Attendance is limited to those officers who are eligible to enroll in the Advanced Course. Course quotas are available through channels from the Military Education Branch, Army National Guard Operating Activity Center, Aberdeen Proving Ground, for ARNG personnel and through channels from the JAGC Personnel Management Officer, Army Reserve Personnel Center (ARPERCEN) (800-325-4916) for USAR personnel. ARNG OAC or ARPERCEN must receive requests for quotas by 29 March 1991. International Law/Claims Team and Contract Law Team officers who wish to attend JAOAC instead of JATT must obtain a JAOAC quota. GRA will permit no transfers between courses after arrival at TJAGSA. GRA will send home personnel who report to Charlottesville without a quota from ARNG OAC or ARPERCEN.

GRA reminds all personnel that students must comply with Army height/weight and Army Physical Readiness Test (APRT) standards while at TJAGSA. Point of contact at TJAGSA for this course is Captain Griffin, Guard and Reserve Affairs Department, telephone (804) 972-6380 or AUTOVON 274-7110, ext. 972-6380.

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## CLE News

### 1. Resident Course Quotas

The Judge Advocate General's School restricts attendance at resident CLE courses to those individuals who have received orders pursuant to allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Active duty personnel obtain quota allocations from local training offices, which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200, if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

### 2. TJAGSA CLE Course Schedule

#### 1990

1-5 October: 1990 Annual CLE Training Program.

15-19 October: 27th Legal Assistance Course (5F-F23).

15 October-19 December: 123d Basic Course (5-27-C20).

22-26 October: 4th Program Managers Attorneys Course (5F-F19).

22-26 October: 46th Law of War Workshop (5F-F42).

29 October-2 November: 4th Procurement Fraud Course (5F-F36).

29 October-2 November: 104th Senior Officers Legal Orientation Course (5F-F1).

5-9 November: 25th Criminal Trial Advocacy Course (5F-F32).

26-30 November: 31st Fiscal Law Course (5F-F12).  
3-7 December: 8th Operational Law Seminar (5F-F47).  
10-14 December: 38th Federal Labor Relations Course (5F-F22).

#### 1991

7-11 January: 1991 Government Contract Law Symposium (5F-F11).

22 January-29 March: 124th Basic Course (5-27-C20).

28 January-1 February: 105th Senior Officer's Legal Orientation Course (5F-F1).

4-8 February: 26th Criminal Trial Advocacy Course (5F-F32).

25 February-8 March: 123d Contract Attorneys Course (5F-F10).

11-15 March: 15th Administrative Law for Military Installations (5F-F24).

18-22 March: 47th Law of War Workshop (5F-F42).

25-29 March: 28th Legal Assistance Course (5F-F23).

1-5 April: 2d Law for Legal NCO's Course (512-71D/E/20/30).

8-12 April: 9th Operational Law Seminar (5F-F47).

8-12 April: 106th Senior Officers Legal Orientation Course (5F-F1).

15-19 April: 9th Federal Litigation Course (5F-F29).

29 April-10 May: 124th Contract Attorneys Course (5F-F10).

8-10 May: 2d Center for Law and Military Operations Symposium (5F-F48).

13-17 May: 39th Federal Labor Relations Course (5F-F22).

20-24 May: 32d Fiscal Law Course (5F-F12).

20 May-7 June: 34th Military Judge Course (5F-F33).

3-7 June: 107th Senior Officers Legal Orientation Course (5F-F1).

10-14 June: 21st Staff Judge Advocate Course (5F-F52).

10-14 June: 7th SJA Spouses' Course.

17-28 June: JATT Team Training.

17-28 June: JAOAC (Phase VI).

8-10 July: 2d Legal Administrators Course (7A-550A1).

11-12 July: 2d Senior/Master CWO Technical Certification Course (7A-550A2).

22 July-2 August: 125th Contract Attorneys Course (5F-F10).

22 July-25 September: 125th Basic Course (5-27-C20).

29 July-15 May 1992: 40th Graduate Course (5-27-C22).

5-9 August: 48th Law of War Workshop (5F-F42).

12-16 August: 15th Criminal Law New Developments Course (5F-F35).

19-23 August: 2d Senior Legal NCO Management Course (512-71D/E/40/50).

26-30 August: Environmental Law Division Workshop.

9-13 September: 13th Legal Aspects of Terrorism Course (5F-F43).

23-27 September: 4th Installation Contracting Course (5F-F18).

### 3. Civilian Sponsored CLE Courses

#### December 1990

1: PLI, The Federal Sentencing Guidelines, New York, NY.

2-6: NCDA, Forensic Evidence, San Diego, CA.

2-7: AAJE, Judicial Problem Solving: Creative and Constructive Techniques, New Orleans, LA.

2-7: AAJE, Judicial Independence, Separation of Powers, Roles of a Judge and Judicial Liability, New Orleans, LA.

3-4: PLI, Litigating Copyright, Trademark and Unfair Competition, Los Angeles, CA.

3-4: PLI, Real Estate Partnerships and Bankruptcy, San Francisco, CA.

4-6: ESI, International Contracting, Washington, D.C.

6: NPI, Evidence for the Trial Lawyer — Faust Rossi, Tampa, FL.

6: GWU, Procurement Law Research Workshop, Washington, D.C.

6-7: PLI, Civil RICO, San Francisco, CA.

6-7: PLI, Immigration and Naturalization Institute, Los Angeles, CA.

6-7: SLF, Institute on Patent Law, Dallas, TX.

6-7: PLI, Telecommunication, Washington, D.C.

6-7: ALIABA, The Role of Corporate Counsel in Litigation, Durham, NC.

6-7: PLI, Title Insurance, San Francisco, CA.

7: NPI, Evidence for the Trial Lawyer — Faust Rossi, Miami, FL.

7: NYSBA, Federal Criminal Practice, New York, NY.

8: PLI, Handling a Narcotics Case, New York, NY.

9-14: NJC, Constitutional Criminal Procedure, Reno, NV.

9-14: NJC, Probate Law, Reno, NV.

10-12: GWU, Patents, Technical Data and Computer Software, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The August 1990 issue of *The Army Lawyer* contains a list of these institutions' addresses.

#### 4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

| Jurisdiction | Reporting Month                                |
|--------------|--|
| Alabama      | 31 January annually                            |
| Arkansas     | 30 June annually                               |
| Colorado     | 31 January annually                            |
| Delaware     | On or before 31 July annually every other year |
| Florida      | Assigned monthly deadlines every three years   |
| Georgia      | 31 January annually                            |
| Idaho        | 1 March every third anniversary of admission   |
| Indiana      | 1 October annually                             |
| Iowa         | 1 March annually                               |

|             |   |
|-------------|---|
| Kansas      | 1 July annually   |
| Kentucky    | 30 days following completion of course                      |
| Louisiana   | 31 January annually   |
| Minnesota   | 30 June every third year                                    |
| Mississippi | 31 December annually  |
| Missouri    | 30 June annually  |
| Montana     | 1 April annually  |
| Nevada      | 15 January annually   |
| New Jersey  | 12-month period commencing on first anniversary of bar exam |

New Mexico  
For members admitted prior to 1 January 1990 the initial reporting year shall be the year ending September 30, 1990. Every such member shall receive credit for carryover credit for 1988 and for approved programs attended in the period 1 January 1989 through 30 September 1990. For members admitted on or after 1 January 1990, the initial reporting year shall be the first full reporting year following the date of admission.

|                |   |
|----------------|---|
| North Carolina | 12 hours annually                                       |
| North Dakota   | 1 February in three-year intervals                      |
| Ohio           | 24 hours every two years                                |
| Oklahoma       | On or before 15 February annually                       |
| Oregon         | Beginning 1 January 1988 in three-year intervals        |
| South Carolina | 10 January annually                                     |
| Tennessee      | 31 January annually                                     |
| Texas          | Birth month annually                                    |
| Utah           | 31 December of 2d year of admission                     |
| Vermont        | 1 June every other year                                 |
| Virginia       | 30 June annually  |
| Washington     | 31 January annually                                     |
| West Virginia  | 30 June annually  |
| Wisconsin      | 31 December in even or odd years depending on admission |
| Wyoming        | 1 March annually  |

For addresses and detailed information, see the July 1990 issue of *The Army Lawyer*.

## Current Material of Interest

### 1. Army Law Library System Note

With the realignment and closing of military bases, certain law libraries will have to dispose of a great deal of reference material. The Army Law Library Service (ALLS) will attempt to coordinate the transfer of books from offices that are closing to offices that require these books. Offices that are preparing to close or downsize should immediately contact TJAGSA and provide a list of materials that will become available, and a predicted date of availability. *The Army Lawyer* will print these

lists as they become available. Other offices may request items on a first-come, first-served basis. Offices must have a genuine need for requested materials, and requests must be signed by the installation's staff judge advocate or senior legal counsel. ALLS will try to arrange a direct transfer of materials from one office to another. Library committees should be aware that if a cutback in ALLS funds occurs, the installation may have to fund the cost of obtaining yearly "pocket parts." Send lists of available materials and requests for materials to: The Judge



Advocate General's School, ATTN: JAGS-DDS (Ms. Daidone), Charlottesville, VA 22903-1781. Ms. Daidone may be reached at 804-972-6394.

## 2. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, the Defense Technical Information Center (DTIC) makes some of this material available to government users. An office may obtain this material in two ways. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. Practitioners may request the necessary information and forms to become registered as a user from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. DTIC will provide information concerning this procedure when a practitioner submits a request for user status.

DTIC provides users biweekly and cumulative indices. DTIC classifies these indices as a single confidential document, and mails them only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and *The Army Lawyer* will publish the relevant ordering information, such as DTIC numbers and titles. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC; users must cite them when ordering publications.

### Contract Law

AD B100211 Contract Law Seminar Problems/JAGS-ADK-86-1 (65 pgs).

AD B136337 Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-89-1 (356 pgs).  
AD B136338 Contract Law, Government Contract Law Deskbook, Vol 2/JAGS-ADK-89-2 (294 pgs).  
\*AD B144679 Fiscal Law Course Deskbook/JA-506-90 (270 pgs).

### Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).  
AD B116103 Legal Assistance Preventive Law Series/JAGS-ADA-87-10 (205 pgs).  
AD B116101 Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).  
AD B124120 Model Tax Assistance Program/JAGS-ADA-88-2 (65 pgs).  
AD B136218 Legal Assistance Office Administration Guide/JAGS-ADA-89-1 (195 pgs).  
AD B135453 Legal Assistance Real Property Guide/JAGS-ADA-89-2 (253 pgs).  
AD B135492 Legal Assistance Consumer Law Guide/JAGS-ADA-89-3 (609 pgs).  
AD B142445 Legal Assistance Guide: Soldiers' and Sailors' Civil Relief Act/JA-260-90-1 (175 pgs).  
AD B141421 Legal Assistance Attorney's Federal Income Tax Guide/JA-266-90 (230 pgs).

### Administrative and Civil Law

AD B139524 Government Information Practices/JAGS-ADA-89-6 (416 pgs).  
AD B139522 Defensive Federal Litigation/JAGS-ADA-89-7 (862 pgs).  
AD B145359 Reports of Survey and Line of Duty Determinations/ACIL-ST-231-90 (79 pgs).  
AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.  
\*AD B145360 Administrative and Civil Law Handbook/JA-296-90-1 (525 pgs).  
\*AD B145704 AR 15-6 Investigations: Programmed Instruction/JA-281-90 (48 pgs).

### Labor Law

\*AD B145934 The Law of Federal Labor-Management Relations/JA-211-90 (433 pgs).  
AD B145705 Law of Federal Employment/ACIL-ST-210-90 (458 pgs).

### Developments, Doctrine & Literature

AD B124193 Military Citation/JAGS-DD-88-1 (37 pgs.)

### Criminal Law

AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).

AD B135506 Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).  
 AD B135459 Senior Officers Legal Orientation/JAGS-ADC-89-2 (225 pgs).  
 \*AD B137070 Criminal Law, Unauthorized Absences/JAGS-ADC-89-3 (87 pgs).  
 AD B140529 Criminal Law, Nonjudicial Punishment/JAGS-ADC-89-4 (43 pgs).  
 AD B140543 Trial Counsel & Defense Counsel Handbook/JAGS-ADC-90-6 (469 pgs).

#### Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

REMINDER: Publications are for government use only.

\*Indicates new publication or revised edition.

### 3. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

| Number  | Title              | Date      |
|---------|--------------------|-----------|
| AR 95-1 | Flight Regulations | 30 May 90 |

|              |  |           |
|--------------|--|-----------|
| AR 210-3     | Nonstandard Activities of the United States Military Academy and West Point Military Reservation | 7 Jun 90  |
| AR 380-19    | Information Systems Security (Consolidates AR 380-380, AR 530-2, AR 530-3)                       | 1 Aug 90  |
| AR 385-16    | System Safety Engineering and Management   | 3 May 90  |
| AR 600-82    | The U.S. Army Regimental System  | 5 Jun 90  |
| AR 601-1     | Personnel Procurement, Interim Change I01  | 31 May 90 |
| CIR 11-87-2  | Army Program (Interim Change I01)  | 3 Jul 90  |
| CIR 350-90-1 | Army Individual Training Program for FY 1991   | 1 Jun 90  |
| CIR 611-90-1 | Implementation of Changes to the Military Occupational Classification and Structure              | 30 Apr 90 |
| FJTR         | Joint Travel Regulations, Volume 1, Military, Change 43  | 1 Jul 90  |
| FJTR         | Joint Travel Regulations, Volume 2, Civilian Personnel, Change 297                               | 1 Jul 90  |
| Pam 11-7     | Requirement Objective Code Program   | 29 Jun 90 |
| Pam 600-26   | DA Affirmative Action Plan   | 23 May 90 |
| Pam 672-6    | Armed Forces Decorations and Awards  | 1989      |
| UPDATE 21    | Message Address Directory  | 30 Jun 90 |



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By Order of the Secretary of the Army:

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Chief of Staff

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The Judge Advocate General's School  
US Army  
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